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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RANDY MOUTON et al., Defendants and Appellants.	A090842 (Alameda County Super. Ct. No. 128560)

Randy Mouton, Eric Greene and Curtis Carroll appeal from convictions of murder, attempted murder, robbery and attempted robbery. They contend that the trial court erred in denying their *Wheeler/Batson*[1] motions regarding the prosecutor's exercise of peremptory challenges, admitting the preliminary hearing testimony of a witness who did not testify at trial, denying appellants' motions to remove a juror, and denying their motion for a mistrial based on testimony given by the prosecution's fingerprint expert; that the prosecutor engaged in several instances of misconduct in argument, and that the trial court improperly failed to instruct the jury that a conviction under the felony murder rule requires proof that the killing was committed by the defendant or his accomplice "in furtherance of their common design" and improperly instructed the jury pursuant to CALJIC No. 17.41.1. Appellant Mouton additionally argues that the trial court erred in denying his motion for a new trial and in rejecting his argument that his sentence of 25 years to life was unconstitutional. Appellants Greene and Carroll argue the trial court

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1 *People v. Wheeler* (1978) 22 Cal.3d 258; *Batson v. Kentucky* (1986) 476 U.S. 79.

erred in imposing a 15 percent limitation on their presentence conduct credits. We affirm.

STATEMENT OF THE CASE

Appellants were charged by an amended information filed on January 17, 1997, with the murder of Gilberto Medina Gil (Pen. Code,[2] § 187); attempted murder of Enrique Rodriguez (§§ 187, 664); robbery of Enrique Rodriguez (§ 211) and attempted robbery of Gilberto Medina Gil (§§ 211, 664). It was alleged that Carroll personally used a rifle (§§ 1203.06, 12022.5) and that Greene and Mouton were armed with a rifle (§ 12022, subd. (d)) in the commission of the first three charged offenses; that Carroll personally inflicted great bodily injury (§ 1203.075) in the commission of the murder; and that Greene previously had been convicted of felony possession of narcotics.[3] The prosecution subsequently dismissed the fourth count (attempted robbery) and the great bodily injury enhancement.

Jury trial was originally set for November 16, 1998, and, after continuances, began on March 29, 1999. On May 12, 1999, the jury found appellants guilty of first degree murder, attempted murder and first degree robbery. The jury found true the allegations that Carroll personally used a rifle in the commission of the offenses and found not true the allegations that Greene and Mouton were armed with a rifle during the commission of the offenses.

Greene filed a motion for a new trial on June 29, 1999, in which Carroll joined on July 9; Mouton filed a motion for a new trial on July 12. These motions were denied on November 12, 1999.

On March 17, 2000, Mouton and Greene were each sentenced to a prison term of 25 years to life on count one, with concurrent upper terms of nine years on count two and

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2 All further statutory references will be to the Penal Code unless otherwise specified.

3 The original information had been filed on October 30, 1996.

six years on count three. Mouton was given credit for 1363 days of actual presentence custody plus 205 days of conduct credit; Greene was given credit for 1458 actual days and 219 days of conduct credit. Carroll was sentenced to a prison term of 54 years to life: 25 years to life on count one, plus a consecutive upper term of nine years on count two, a concurrent upper term of six years on count three and consecutive terms of 10 years for the firearm use enhancements on counts one and two. Carroll received credit for 1363 actual days and 205 days of conduct credit.

Greene filed a notice of appeal on March 17, 2000; Carroll filed his notice of appeal on March 20, 2000; and Mouton filed his notice of appeal on March 31, 2000.

STATEMENT OF FACTS

In January 1996, Enrique Rodriguez was almost 16 years old and lived in apartment 302 at 1900 26th Avenue in Oakland with his parents, a brother and a friend named Gilberto Gil. On January 20, 1996, Rodriguez had accompanied Gil to the restaurant where Gil worked, Gil had cashed a check and the two had visited a friend. When they returned to the apartment building, after dark, it was raining heavily. Gil opened the front gate with his key and they climbed the stairs to a second door, which Gil also opened with a key. A black male about 16 years old, whom Rodriguez had seen around the building a few times, left as Rodriguez and Gil entered. Rodriguez subsequently identified the young man as Nakeyveyon Jones.

As Rodriquez followed Gil up the next staircase, a group of about four young African-American men appeared from behind the stairs.[4] They were all wearing dark colored jackets and pants and had their heads and faces partially covered with white cloth (except for one that was green or yellow), so that Rodriguez could see only their eyes, noses and cheeks. They appeared to be 16 to 20 years old, skinny and about 5'6" to 5'8" tall, although some could have been taller or shorter.[5]

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4 Rodriguez had told the police there could have been five or six in the group but testified that four was his "best estimate."

One of the group pointed a short barreled rifle at Rodriguez and said, "Break yourselves, mother fuckers." Rodriguez noticed the person he had seen leaving the building come back inside and stand by the door, "like he was scared or something." Gil ran up the stairs and the man with the rifle chased him. The others grabbed Rodriguez, made him walk to the landing, searched him and took his wallet, which contained less than $40. They then told him to run, and Rodriguez ran to his apartment. As he reached the third floor, he heard three or four gunshots. He turned the corner to go to his apartment and saw the man with the rifle shooting Gil, who was lying on his stomach in front of the apartment door. Rodriguez saw the man fire four shots in rapid succession. The man turned, shot Rodriguez twice, in the left hand and right arm, then ran down the stairs. Rodriguez ran to the fire escape, watched the front door of the building until the police arrived and did not see anyone leave the building. About two minutes after a police officer arrived, the paramedics came and took Rodriguez to the hospital for treatment.

Rodriguez spoke to the police shortly after he arrived at the hospital, then again at about 3 a.m., and at his house about 10 days later. He initially told the police officer he did not recognize any of the men but that the one he had seen leaving the building might have lived in the building. At trial, Rodriguez testified that he knew Mouton from living in the building and that Mouton had been "a lot" shorter in January 1996. Rodriguez did not recognize Greene as living in the building.

Oakland Police Sergeant Thomas Swisher, who had retired by the time of trial, testified that he spoke with Rodriguez at about 2:30 a.m. on January 21. Rodriguez was in a lot of pain from his gunshot wounds. He told Swisher that he had looked out the fire escape door and had not seen the shooter leave the building, and that the shooter was about 5'8" tall. On January 31, Swisher showed Rodriguez photographs of Mouton, Greene and Jones. Rodriguez did not recognize Greene, said Mouton lived on the first

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5 Rodriguez had told the police at the time of the incident that the men in the group were between 5'6" and 5'11" and that the one with the gun was about 5'11".

floor of the building, and identified Jones as the person he saw leaving the building as he and Gil entered.

Transito Chavez, who lived in unit 110 on the first floor of the building, was outside smoking a cigarette about 15 minutes before the shooting. It was not raining. Chavez was holding the door of the building open about a foot and he could see the whole lobby. He observed four young men, about 5'6" to 5'7" and 130 to 140 pounds, enter the lobby, then walk toward the stairs and go up. The group included Mouton, whom Chavez had seen around the building a number of times, and three others whom he had seen "once or twice" talking with Mouton. They were dressed in dark clothing. Chavez returned to his apartment and about 15 minutes later heard seven shots, with a gap of one to three seconds between some of the shots. He then heard people running down from the second floor, followed by the sound of someone laughing and people gathering outside the apartment.

About a week after the shooting, Chavez was interviewed by the police and identified a photograph of Mouton. He testified at trial that a photograph of Mouton showed one of the four people he had seen in the lobby and a photograph of Nakeyveyon Jones "could have been" one of the people. He did not recognize a photograph of Greene as one of the people.

Oakland Police Officer Cynthia Espinoza arrived at 1900 26th Avenue at about 11:21 p.m. on January 20, 1996. Two other officers were already at the front gate. They banged on the gate until it was opened by Mouton. There were five or ten people in the lobby, who directed the police to the third floor. Espinoza found Gil lying on his stomach, unconscious, a little bit past unit 302. Rodriguez was standing, holding his arm where he had been shot. Espinoza took a brief statement from Rodriguez, who was then taken to the hospital by the paramedics.

Espinoza and other officers searched the hallway for evidence. Officer Jack Doolittle found eight expended .22 caliber casings in the hallway and near Gil's body, and two deformed bullet slugs under his body. He also observed two strike marks, one in the wall near the doorway to apartment 302 and the other closer to the fire escape, that

appeared to have been made by bullets fired from the direction of the staircase. The strike marks appeared to be recent, but Doolittle had no way of knowing when they were made. Doolittle found a wallet in Gil's pocket containing $342.

Espinoza and Doolittle were both at the scene for about four and a half to five hours. Four African-American youths in their late teens attracted their attention because they "continually" came up and down the stairs, going in and out of unit 315, "trying to get as close to the scene as possible; never asking any questions but seemed to be very interested in what was going on." Espinoza testified that of the group, Mouton appeared the most interested. Doolittle had a gunshot residue test kit available, but did not test any of the four; he testified that the test would be worthless if the suspect's hands had been washed.

Espinoza spoke with the four in the lobby and they identified themselves as Eric Greene, Curtis Lofton, Randy Mouton and Nakeyveyon Jones. Greene provided identification showing his name and address in San Leandro, and gave his birthdate as May 11, 1975. He was wearing a blue shirt and black jeans and was 5'10" and 140 pounds. The other three did not provide identification. Lofton gave his address as 1900 26th Avenue, unit 102, and his date of birth as August 5, 1976. He was wearing a dark blue jacket, red plaid shirt and black pants and was about 5'10" and 155 pounds. Mouton also gave unit 102 as his address, and gave a birth date of December 19, 1979. He was wearing a blue and gray cap, black leather jacket, blue shirt and black jeans, and appeared to be about 5'4" and 120 pounds. Nakeyveyon Jones gave his address as 2107 89th Avenue. He was wearing a blue multi-colored shirt and light blue jeans. In response to Espinoza's question, all four denied knowing anything about the shooting, although one said something about having heard gunshots.

Doolittle testified that the apartment building had one main door and two fire escapes. One fire escape led to the sidewalk, with a folding ladder that could be released for descent to the sidewalk; the other led to the courtyard. The fire escapes had unrestricted access to the building. The apartment manager testified that the courtyard was surrounded by a 10-foot fence, with a gate leading to 26th Avenue that was supposed

to be kept locked. Police officer Bernard Thurman, who was also investigating the scene just after the shooting, testified that the ladder on the fire escape to the courtyard was not extended.

The manager of the apartment building testified that in January 1996, 22 of the 41 units in the building were occupied. Transito Chavez lived in unit 110 on the first floor. Three African-American males between the ages of 15 and 25 years lived in the building, one, a "heavyset guy" about 250 to 300 pounds, in unit 111, and two in unit 102. The manager often saw the taller of these two in apartment 212, which was rented to Maria Watson.

Police officers who canvassed the building shortly after 11:30 p.m. on January 20 were able to contact people in 11 of the 38 apartments. These included Maria Watson, an approximately 20-year-old African-American in apartment 212, Dorothea Smith—Mouton's mother—an approximately 40-year-old African-American in apartment 102, and an African-American in apartment 314 who gave his name as Antoine Lofton and his birthdate as August 5, 1976. At trial, appellant Carroll's uncle testified that Carroll's father's name was Curtis Lofton and that Curtis Carroll's birthday was August 5, 1978. One of the officers, Bernard Thurman, noticed two or three young men going back and forth from the exterior of the building to apartment 102; at one point, one of the young men came from the direction of apartment 102 and put a bag into a dumpster. Thurman's subsequent search of the premises included the insides of the dumpsters.

Shawnique Peterson testified that on January 20, 1996, she was living in apartment 314 at 1900 26th Avenue with her two children. She had been "going out" with appellant Greene for about a year; he stayed with her two or three times a week and with his mother in San Leandro the rest of the time. Greene, Mouton and Carroll were close friends and spent "a lot" of time together. Carroll did not live at the building but Peterson saw him there every day. Mouton lived on the first floor of the building with his mother, Dorothea Smith.

Peterson had been in Mouton's apartment often and on one occasion before January 20 had seen two guns, one that looked like a rifle and one a "long gun" that

looked like an "Army gun" or "machine gun." The latter had a "Banana Clip" that held "a lot" of bullets. The rifle was kept under a mattress and the other gun was kept wrapped in a sheet in a closet. The day Peterson saw the guns, she was in the apartment with the three appellants and Mouton and Carroll took the guns out. On December 31, 1995, Peterson was in her apartment with the three appellants and the three talked about celebrating New Year's by going to the roof of the building and shooting "the gun."[6]

On January 20, 1996, Peterson left the building around 5 or 6 p.m. to go to her mother's house. Before leaving, she went to Mouton's apartment and gave Greene a kiss goodbye. The three appellants were there, as well as a 14 or 15 year old with a "funny name" whom Peterson had not seen before. This teen-ager's name "might" have been Nakeyveyon.

Over the course of the evening, Peterson and Greene paged each other about every half hour, five or six times each. Greene's pages left Peterson's phone number except for the last page before Peterson returned to the building, which left Mouton's phone number. Peterson returned to the building at about 9:30 or 10 p.m. and saw police officers but not paramedics. Appellants and the teenager were in Peterson's apartment and remained there for about an hour, until Peterson got ready to go to bed. At that point, Mouton, Carroll and the teen-ager left and Greene stayed.

Peterson learned the next day that Greene had been arrested. Sometime after that, she was interviewed by the police at her house. The day following the interview, Mouton's brother Omar called her over to an apartment across the street, saying Carroll wanted to talk to her. Mouton had already been arrested by this time. Omar asked Peterson, "'what they say about "E,"'" and Peterson believed he was asking about Greene. She replied that "they was trying to pin him down for murder" and that this

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6 Maria Munoz testified that on the afternoon of New Year's Day in 1996 she heard a shot and then saw a "black" young man in the doorway to the courtyard of the building shoot a rifle three or four times. She subsequently picked Mouton's photograph from a line-up and at trial identified Mouton as the shooter.

"wasn't right because he didn't do that." Peterson asked Carroll what had happened and Carroll said that he had shot the "Mexican guy." Peterson asked where the gun was and Carroll said he had it and was going to destroy or sell it and leave town.

Peterson acknowledged that when she first talked to the police she told them Greene was alone in her apartment when she returned on the night of January 20 and that this was not true. Her relationship with Greene continued for about a year after this incident and she testified that she "really like[d] him." She testified that she liked Carroll, too, and did not get angry with him.

Peterson testified that at the time of the shooting Mouton was about 16 years old, Carroll was about the same age or older, Green was a few years older, and the teen-ager appeared to be a year or two younger than Mouton and Carroll. Peterson had never seen Greene hold a gun. Peterson acknowledged that she was on probation for a misdemeanor battery which occurred on February 26, 1997.

Dorothea Smith, Mouton's mother, testified that Mouton and Carroll had been close friends throughout their lives. On January 20, 1996, she lived in her apartment with her fiancé and Mouton; the apartment had one bedroom and Mouton sometimes slept there and sometimes slept on the couch. Omar Smith sometimes stayed with her but often stayed with girlfriends. On March 20, 1996, police officers searched the apartment and found a rifle under the couch. She had never seen the rifle before and had never seen ammunition in the house or in Mouton's possession. On the evening of January 20, she was in her apartment when she heard the shooting and Mouton was there as well. Asked whether she had told the police on March 20 that she and Mouton were not at the apartment building when the shooting took place, she testified that she did not remember what she had told them and said, "I probably was drinking."

On March 20, 1996, Detective Thomas Swisher conducted a search of the apartment where Dorothea Smith and Mouton lived. Smith pointed to a couch in the front room as being where Mouton slept and to a closet where he kept his clothes. The police found a .22 rifle wedged between the springs and cushions of the couch, a shotgun shell on the floor behind the couch, and a bag under the couch containing a liquor box

and a long sock that each contained .22 caliber ammunition. The liquor box held a 100-count box of "CCI .22 long rifle hallow point mini mag rounds," missing 15 or 16 rounds; the sock held five smaller boxes of "Thunderbolt brand .22 caliber ammunition." The police also found "CCI mini mag" .22 caliber rounds under the mattress in the bedroom, with some 83 missing from the 100-count container. In the closet, the police found seven 12-gauge shotgun shells. A .22 caliber casing was found on the floor in the front room. Dorothea Smith denied having any knowledge of weapons or ammunition in her home. In an interview about six hours after the search, Smith told Swisher that she, her boyfriend and Mouton had been out visiting her daughter on the evening of January 20, 1996, visiting her daughter and that the shooting had already occurred by the time they returned to the building.

Lansing Lee, a criminalist with the Oakland Police Department, testified that the eight casings recovered from the homicide scene were .22 caliber, either "long" or "long rifle," manufactured by CCI. All eight were fired from the same firearm, which was not the rifle found in Mouton's apartment. The 12 casings recovered from the roof of the building were also CCI long or long rifle .22 caliber. Three of these 12 casings were fired from the same firearm that fired the ones at the homicide scene; six were fired by the firearm found in Mouton's apartment; and three were fired by a third firearm.

Mouton was arrested on March 20, 1996; Greene was arrested on March 21, 1996, and Carroll was arrested on April 9, 1996.

Criminalist Jennifer Hannaford testified that a fingerprint on the liquor box found in Mouton's apartment belonged to Carroll A fingerprint on the underside of the lid of the cartridge box found in Mouton's apartment belonged to Mouton.

Swisher interviewed Nakeyveyon Jones on March 18, 1996, as a witness, because Jones had been seen leaving the building just before the shooting. Jones first denied knowing anything about the shooting and said he had never been at an apartment house at 26th and Foothill. After Swisher showed him a witness sheet from the crime report that listed his name and a photo lineup containing his photograph, Jones "remembered being at the scene the night of the shooting." Jones said he had been with appellants before the

shooting and had left the building because he "didn't want any part of the robbery that had been planned." He said he had seen two Hispanics come into the building as he left. After the shots were fired, Mouton's mother let Jones back into the building and told him to go to the second floor, where the other young people were. He went back inside the building after the shots were fired. Swisher characterized the interview of Jones as "low-keyed," with no yelling and no threats. Nakeyveyon Jones was not available to testify at trial and his preliminary hearing testimony was read into the record over appellants' objections. Jones testified that on the evening of January 20, 1996, he left his house with his friend Chris, Carroll, Omar Smith and "some females" in Chris's car. Chris drove to the store and the girls got out and bought some chips. The group then continued to Mouton's mother's apartment, where Mouton's mother let them in; Mouton was there. At another point in his testimony, Jones said that Mouton had been with him, Carroll, and the girls when they first came to the building. Jones testified that on the way into the building, some boys had given them some trouble and one had said he was going to shoot Jones. He testified that he went to get Mouton, who came out with a rifle and then returned inside.

After about 10 minutes, Chris and Omar left. Jones wanted to leave but Omar told him to stay. Jones saw Mouton jump on top of the refrigerator and pull two rifles from behind it, look at them and put them back. Carroll and Mouton talked about having shot the gun "on New Year's."

Jones initially testified that he, Mouton and Carroll went upstairs to Greene's apartment and watched television for about 10 minutes, then Jones and Carroll returned to Mouton's apartment and continued talking with the girls, after which Green and Mouton came back to the apartment and the girls left to go to the club "Faces."[7] At another point in his testimony, Jones stated that he remained downstairs while the girls were there and did not go upstairs with the others until after the girls left. After the girls

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[7] Jones had not met Greene before this evening.

left, Jones and the three appellants went back to Greene's apartment and Mouton suggested going to a club called "Faces." Carroll suggested they rob someone and Mouton and Greene agreed; Jones did not want to and appellants called him names. Mouton got a gun which he and Carroll told Jones was not loaded: Jones testified first that the group went back to Mouton's apartment and Mouton came out with a rifle that he "pointed around," then later testified that he remained upstairs in Greene's apartment when Mouton went downstairs and got the gun. Appellants put on masks made from tee shirts. Jones wanted to go home. He testified initially that Carroll told him not to leave because "we had got into it with some boys downstairs," and later that he was scared to go outside because there were "some boys I had problems with down there that said they was going to shoot me."

In any event, Jones left. He testified at one point that when he left Mouton was holding the gun and at another point that when he left Mouton had handed the gun to Carroll. As Jones left the apartment building, he saw two Mexican men entering. Jones went to the corner, looking for a bus to go home, but there was not one coming. A minute after seeing the men enter the building, he heard gunshots and ran back inside. He went to Mouton's apartment and knocked but there was no answer, so he went upstairs to a girl's apartment he had previously been to with Carroll. An "old lady" opened the door and Jones saw appellants and a girl there. Appellants were breathing fast and talking about the robbery. Carroll was rummaging through "the wallet." Jones saw a piece of paper with Spanish words on it fall from the wallet. Jones saw someone put the gun under the bed and appellants told Jones, "don't say nothing." Jones was scared and called his mother and father to pick him up but neither was able to. Someone knocked on the door and Greene told Jones not to answer it and went into a closet. Jones testified that Greene's girlfriend came into the apartment after the shooting, although he indicated this occurred in Greene's apartment.

Later, Mouton went downstairs, followed by Jones and Carroll and then Greene. They were stopped by the police, who asked for their names. Carroll gave a fake name. Appellants went to the store, then returned to the building; Mouton and Greene went

inside and Jones and Carroll left. On the way home, Carroll told Jones not to tell anyone anything and Jones was scared, thinking "probably he was going to shoot me." Subsequently, Jones saw Carroll when Carroll came to see Jones's cousin and Carroll told Jones, "I never thought I could pull a trigger like that."

Jones acknowledged that he had been arrested for driving a stolen car with a gun in it, and that he was on probation. He had also been found in possession of cocaine, although he claimed some other boys had "put it on [him]." Jones testified that when he was interviewed by the police a couple of months after the shooting, he first lied because he was scared, then told the truth.

Defense

Appellants did not testify. Barbara Glasper testified as a witness for Carroll that Carroll stayed with her in Sacramento in January and February 1996. She saw Carroll every day or every other day and did not remember what he did on January 20. To Glasper's knowledge, Carroll did not have a car. Glasper had committed a credit card fraud in August 1996.

Omar Smith, Mouton's brother, testified as a witness for Carroll, whom he said had been a close friend most of his life. Smith testified that in January 1996 he stayed sometimes with his mother at 1200 26th Avenue and sometimes with Maria Watson, who was the mother of his child.[8] He testified that he was in the building when the shooting occurred on January 20, then later stated he was in the building on January 20 but left before the shooting. Smith did not know a person named Chris, had not been with someone named Chris that day and had not been in a car with Jones that day. He knew that Mouton had a gun at his mother's apartment because he saw the police retrieve it when they searched the apartment. Smith denied ever being present at a conversation in which Carroll confessed the killing to Peterson. On New Year's Eve in 1995, Smith shot his pistol in front of the building, then drove away. He acknowledged that at the time of

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8 Omar Smith testified against the advice of his attorney.

trial he was on felony probation for possession of cocaine base for sale and that he had burglarized a house in 1993.

DISCUSSION

I.

Appellants maintain the trial court committed reversible error in denying their *Wheeler/Batson* motions. The prosecution exercised a total of 17 peremptory challenges[9] in this case, eight of them directed toward African-Americans.[10] Appellants claim seven of the eight peremptory challenges of African-Americans were improperly used to exclude these jurors because of their race.[11] The final jury included two African-Americans.

After the prosecutor exercised his sixth peremptory challenge, appellants moved for a mistrial under *Wheeler*, stating that three of the prospective jurors excused by the prosecution were African-American.[12] The court denied the motion, noting that three African-Americans remained on the panel and saying, "Maybe we should wait to see what happens further." The *Wheeler* motion was renewed after the prosecutor's seventh peremptory challenge, and was denied, the court stating it was denied "based on my

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9 The prosecutor at trial claimed he had exercised 18 challenges; the record reflects 17.

10 The prospective jurors excused were James B., Vera P., Abubakar B., Deborah N., Getahun B., Shirley G., Carey M., Melba B., Jose Y., Cynthia I., John. J., Syreeta D., Claire N., Charles B., Cassandra V., and Artena P.

11 Appellants do not challenge the removal of one of the African-American jurors, Syreeta D. At trial, appellant Greene tried unsuccessfully to have Syreeta D. removed for cause, arguing that she did not have "the grasp of what's going on." The prosecutor excused her because she was "not very bright" and the prosecutor was concerned about her ability to understand the case, as well as because she was 20 years old and the prosecutor did not want a juror with "limited life experience."

suppositions as to why, but we can go into that." The motion was raised again after the ninth, thirteenth, fifteenth and seventeenth challenges. The court subsequently explained that it denied the motion after the prosecutor's seventh challenge because the prosecutor "had made a strong pitch" for the juror in question, Shirley G., to be removed for cause," so the court "assumed" the prosecutor "had some basis other than the fact that she was African-American."

With respect to the subject of the prosecutor's ninth challenge, Melba B., the court denied the motion, stating: "Ms. [B.], as you all will recall, filed a hardship. Well maybe I should let the district attorney say. But, anyway, filed a hardship. And as best I can tell the district attorney might have been trying to ingratiate himself with the rest of the jurors or something by letting Ms. [B.] go since she was on a stick and she was elderly, so forth so on. I may be wrong in all that, but that's my assessment." At the point Melba B. was excused, there were apparently two African-Americans in the jury box and three or four African-Americans in the audience.

The court discussed the *Wheeler* issues regarding the last three peremptory challenges with counsel after the final jury was empanelled. The court stated it did not "have any clues" as to the reasons for excusing these three jurors, with the "possible exception" of Artena P., as to whom the court said it "could surmise that she was excused because of her physical illness, but I don't know." The court then stated, "I could leave the record as it is and say there is no prima facie case based on the fact that there remain two African-Americans. I think it's more helpful, however, and you don't have to do it, if you don't want to, Mr. [Prosecutor]. I think it's more helpful if you were to indicate, first of all, as to whether or not I was correct; or am correct. I thought I saw you shaking your head, yes, with respect to the first five."

The prosecutor then explained his reasons for excusing each of the eight African-American prospective jurors. The trial court denied the mistrial motions. Appellants

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12 Greene's attorney, who made the motion, was under the impression that the prosecution had exercised five peremptory challenges; in fact, the record reflects that the

contend that the trial court erred in failing to find a prima facie case and in accepting the prosecutor's reasons—which appellants view as a "sham" and unsupported by the record—without independent inquiry into their validity.

"The use of peremptory challenges to eliminate prospective jurors because of their race is prohibited by the federal Constitution (*Powers v. Ohio* (1991) 499 U.S. 400, 409 . . . ; *Batson v. Kentucky*[, *supra*,] 476 U.S. 79, 89 . . .) and by the California Constitution (*People v. Wheeler*[, *supra*,] 2 Cal.3d at p. 276-277 . . .)." (*People v. Mayfield* (1997) 14 Cal.4th 668, 722-723.) "Under *Wheeler* and *Batson*, '"[i]f a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court. First, . . . he should make as complete a record of the circumstances as is feasible. Second, he must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule. Third, from all the circumstances of the case he must show a strong likelihood [or reasonable inference] that such persons are being challenged because of their group association . . . ."' (*People v. Howard* (1992) 1 Cal.4th 1132, 1153-1154 . . . ; *People v. Turner* [(1994) 8 Cal.4th 137,] 164; *People v. Wheeler, supra*, 22 Cal.3d at pp. 280-281.)" (*People v. Box* (2000) 23 Cal.4th 1153, 1187-1188.) "[I]n California, a 'strong likelihood' means a 'reasonable inference.'" (*People v. Box, supra,* 23 Cal.4th at p. 1188, fn. 7.)

"[O]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination. (*Hernandez v. New York* (1991) 500 U.S. 352, 358-359, . . . (plurality opinion); *id*., at 375, . . . (O'Connor, J., concurring in judgment); *Batson, supra*, at 96-98, . . . The second step of this process does not

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Wheeler motion was made after the prosecution's sixth challenge.

demand an explanation that is persuasive, or even plausible. 'At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral.' (*Hernandez*, 500 U.S., at 360, . . . (plurality opinion); *id*., at 374, . . . (O'Connor, J., concurring in judgment). . . . It is not until the third step that the persuasiveness of the justification becomes relevant--the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination. (*Batson*, *supra*, at 98, . . . ; *Hernandez*, *supra*, at 359, 111 S.Ct., at 1865 (plurality opinion). At that stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." (*Purkett v. Elem* (1995) 514 U.S. 765, 767-768.) "[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." (*Id.* at p. 768.)

The prosecutor's explanation "need not be sufficient to justify a challenge for cause" and "[j]urors may be excused based on 'hunches' and even 'arbitrary' exclusion is permissible, so long as the reasons are not based on impermissible group bias." (*People v. Turner, supra,* 8 Cal.4th 137, 165.)

A reviewing court generally accords "great deference to the trial court's ruling that a particular reason is genuine," though "only when the trial court has made a sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror. . . . When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. But when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient." (*People v. Silva* (2001) 25 Cal.4th 345, 385-386.)

In the present case, the trial court initially stated the reasons it believed the prosecutor had excused the jurors in question. The court then indicated that it could find appellants had failed to make a prima facie case because two African-Americans remained on the jury. Rather than expressly doing so, however, the court suggested if

would be better for the prosecutor to indicate whether the court's views were correct. The prosecutor took the court's statements to mean the court was finding a prima facie case and set forth his reasons for excusing each of the jurors.[13]

At the outset, it is worth noting that the trial court clearly should not have offered speculative theories as to why the prosecutor might have justifiably sought to exclude the jurors in question: It was for the prosecutor, not the court, to explain his reasons if the court determined appellants had made a prima facie case of group bias. The trial court's gratuitous "assumptions" that the prosecutor had satisfactory race-neutral explanations for challenging Shirley G. and Melba B. does not suggest it entertained the defense motion with the open mind warranted by the situation. Moreover, it appears the trial court was attempting to have it both ways by failing to affirmatively find no prima facie case had been made but encouraging the prosecutor to state his justifications as though a prima facie case had been made. Since the prosecutor took the court to be finding a prima facie case and, accordingly, fully stated his reasons for challenging each of the jurors, we will review the reasons set forth as though the trial court had in fact found a prima facie case. "Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." (*Hernandez v. New York, supra,* 500 U.S. 352, 359; see *People v. Sims* (1993) 5 Cal.4th 405, 429; *People v. Fuentes* (1991) 54 Cal.3d 707, 717.)

Vera P.

The prosecutor stated that he excluded Vera P. because she had "admitted that she [had] been convicted of a moral turpitude crime and that is credit card fraud. She was in possession of a stolen credit card." The prosecutor did not feel a person who had been

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13 The prosecutor told the court: "I believe by your statements, you're indicating there is a prima facie case, I will go ahead and justify all eight of the African-Americans that were dismissed and the rationale I have for the record to make our record absolutely clear."

convicted of a moral turpitude offense was a suitable juror in a criminal case. "Additionally, Vera P. laughed at the question by [Carroll's attorney] who sarcastically asked do all of you necessarily immediately believed [*sic*] police officers." The prosecutor stated that others had similarly laughed at this question and that he had noted these jurors because he found the reaction "inappropriate."

Appellants point out that the question to which Vera P. and others laughed was actually "[d]oes anyone here have a distrust for police?" Vera P. was not actually asked whether she would necessarily believe a police officer. Rather, the prosecutor asked jurors generally to talk about any problems they might have with assessing police officers' credibility or any negative experiences they had had with police officers. After three others spoke about experiences with the police,[14] Vera P. was asked about her arrest and explained that she had pled no contest to a charge of being an accessory to someone who had used a stolen credit card.

Appellants do not argue that a prospective juror's prior conviction for an offense involving moral turpitude cannot be a valid reason for exercising a peremptory challenge. Rather, they attack the sincerity of the prosecutor's reliance on this reason by noting that two Caucasian jurors were kept on the jury despite their having been arrested in the past. The California Supreme Court has repeatedly rejected "a procedure that places an "undue emphasis on comparisons of the stated reasons for the challenged excusals with similar characteristics of nonmembers of the group who were not challenged by the prosecutor," noting that such a comparison is one-sided and that it is not realistic to expect a trial judge to make such detailed comparisons midtrial.' (*People v. Turner, supra,* 8 Cal.4th at p. 169, quoting *People v. Johnson* (1989) 47 Cal.3d 1194, 1220-1221.)" (*People v. Box,*

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14 James B. spoke about having been booked and released for driving under the influence when in fact his tests came back negative, but stated he did not think this would make him distrust an officer's testimony. Trial juror No. 7 discussed having been falsely accused by a police officer as a teenager and stated this would not cause distrust of an officer's testimony. Suzanne C.'s best friend's son had been arrested for possession of narcotics; the friend did not think he had been mistreated.

supra, 23 Cal.4th at p. 1190.) As the above quotation demonstrates, the California Supreme Court has not completely barred comparisons between jurors who were challenged and jurors who were not, but rather has cautioned against "undue emphasis" on such comparisons. Such comparisons may form a necessary and useful part of the consideration of "all the circumstances" bearing on the inferences to be drawn from a prosecutor's exercise of peremptory challenges. Superficial comparisons, however, risk ignoring the realities of jury selection, including that peremptory challenges are generally based on a combination of factors, that the characteristics a prosecutor finds acceptable may vary as the composition of the jury is altered during the selection process of a peremptory challenge, that a prosecutor may be willing to accept a single juror with a given characteristic or viewpoint but not a number who share it, and that the factors upon which the prosecutor assesses prospective jurors may be given different weight depending on how many peremptory challenges remain to be used. (See, *People v. Johnson*, *supra*, 47 Cal.3d at p. 1220.)

Here, the comparison between Vera P.'s conviction of an offense related to use of a stolen credit card and the prior arrests of Trial Jurors Nos. 7 and 8 simply does not work. Whatever the explanation Vera P. offered, she pled no contest to an offense involving moral turpitude. Juror No. 7 had never been convicted of any offense but had been falsely arrested as a teen-ager. The issue implicated by the prior arrest was not the juror's moral fiber but the possibility of the juror's harboring of ill will toward the police, and the juror's answers indicated the experience would not affect his/her ability to judge the case impartially. Similarly, Trial Juror No. 8, an epileptic, had been arrested in the 1960's because the police thought he/she was drunk and disorderly. The juror, like Juror No. 7, stated there was nothing in this experience that might affect his/her ability to be fair and impartial.

Abubakar B.

Abubakar B. was the social director of an after school program for underprivileged youth in San Francisco. The prosecutor felt "folks who work in those sorts of organizations who work with kids who may be underprivileged may have a certain

sympathy for children or teenage youth." The prosecutor acknowledged that Abubakar B. had said he would not "be necessarily sympathetic" and "described it as probably a tragedy if he believed these defendants in fact committed murder," but the prosecutor believed Abubakar B. "might have a more forgiving attitude toward these three defendants because the very nature he does work for, folks come from a similar background as these three defendants." The prosecutor also noted that Abubakar B. "had a lot of questions about the law which disturbed me. He asked about the, quote unquote, chain of criminology in reference to felony murder. What if I believed there were varying degrees of culpability." Abubakar B. was also one of the jurors who laughed sarcastically at Carroll's attorney's question about believing police officers' testimony. Additionally, Abubakar B. did not answer six questions on the juror questionnaire, including "innocuous questions about, for example, his kids and things of that nature."

Appellants suggest that the prosecutor's comment about Abubakar working for people from a "similar background" to appellants' reflects an improper reason for the challenge, that because Abubakar was African-American and worked with poor African-Americans, he would "have a group bias for racial reasons." Appellants also point out that Abubakar B. explained he asked questions about accomplice liability because he "just wanted to know how these rules follow."

The prosecutor's expressed belief that Abubakar B.'s occupation suggested he might be sympathetic toward appellants because of their age was a race-neutral reason for excusing him from the jury. (See, *People v. Trevino* (1997) 55 Cal.App.4th 396, 411-412 [no prima facie case where challenged prospective jurors or their spouses worked in health care field, which prosecutor may have believed made them less sympathetic to prosecution's case]; *People v. Landry* (1996) 49 Cal.App.4th 785, 791 [belief that juror who worked in youth services might be biased in favor of defendant constituted race-neutral explanation for challenge]; *People v. Barber* (1988) 200 Cal.App.3d 378, 394 [kindergarten teacher challenged because prosecutor believed teachers likely to be liberal].) That Abubakar B. stated he would not be influenced by sympathy based on appellants' age did not preclude the prosecutor from drawing a different inference. When

the prosecutor asked during voir dire whether anyone had particular sympathy for appellants because of their young age, Abubakar B. asked if "sympathy" was the "same thing as understanding of this tragedy." This apparent sensitivity to appellants' circumstances could easily have caused the prosecutor to question whether this juror would be sympathetic to appellants. Appellants' assertion that the record does not support the prosecutor's reasons for excusing Abubakar B. is not well founded.

Getahun B.

Getahun B., the prosecutor stated, had also "indicated the age of the defendants was a factor which might cause him trouble in ultimately finding them guilty if he believed they were guilty beyond a reasonable doubt. He was not sure whether he could do so. He was ambivalent. I can't take that chance. I need someone who is going to say adamantly that is not an issue." The prosecutor noted that he had excused a Caucasian prospective juror, Deborah N., for similar reasons, because she had "indicated she was not sure based on the defendant's age whether she in fact could find them guilty even if I proved my case." The prosecutor also noted that Getahun B. had "voiced his concerns about police brutality" and "indicated that might color his view of the testimony of the police officers."

Appellants note that Getahun B. ultimately stated he would follow the law. Contrary to appellants' assertion that Getahun B. said he "would not have difficulty following the law," however, Getahun B. acknowledged that appellants' age might make it difficult for him to follow the law, although he would do so. There is no basis for concluding that the record did not support the prosecutor's reason for excluding Getahun B.

Shirley G.

Shirley G. had answered on her juror questionnaire that she had never been arrested or accused of a crime. The prosecutor explained that when Carroll's attorney asked the jurors whether they would immediately believe police officers, Shirley G. answered "no" so emphatically that he decided to ask additional questions, at which time she stated that she had been "locked up for 12 hours, she contends falsely arrested by

police officers in the City of Oakland by the Oakland Police Department. Her tone of voice was angry when describing these events. I asked her whether she was influenced by any other events in her life about police officers. She said, yes, her best friend was beaten up in her presence by Oakland police officers." The prosecutor noted that he had excused a Caucasian prospective juror, James B., who stated he had had a negative experience with police officers.

Appellants point out that Shirley G.'s arrest occurred at least 10 years before the trial, and had not resulted in any charges against her. According to appellants, Shirley G. "readily admitted" the experience was negative, but did not express present hostility toward the police or unwillingness to follow the law. While the record does not reflect any direct statement by Shirley G. expressing hostility toward the police, her account of the arrest experience clearly reflects negative feelings about the way she was treated—she noted that "they never even told me they dropped it" although she waited all day in court, that she was "throwed in the patty [*sic*] wagon with males," that she told the police the truth but they did not believe her and that the police strip searched her. Asked if she had any other negative experiences that might shade her view of the police, Shirley G. discussed her friend being beaten by the police and subsequently winning a civil suit against them. Even on the "cold" record, Shirley G.'s responses suggest a degree of anger or hostility.

Appellants note that Trial Juror No. 7 was kept on the jury despite having been arrested falsely as a teenager and having a son who was arrested for petty theft and a cousin who was charged with robbery. The tone of this juror's answers, however, differed greatly from Shirley G.'s. Juror No. 7 affirmatively stated that the arrest experience would not affect his/her ability to assess police officers' credibility and that he/she did not harbor any ill will towards police officers, as well as that he/she felt the son had been treated fairly by the police and that he/she had no information about how the cousin had been treated.

Juror No. 8 was also kept on the jury despite having been wrongly arrested in the past. As stated above, this juror was an epileptic and had been arrested in the 1960's

because the police thought he/she was drunk and disorderly. Like Juror No. 7, Juror No. 8 stated there was nothing in this experience that might affect his/her ability to be fair and impartial. Asked if he/she had any negative feelings toward the Oakland Police Department, the juror replied, "Not really. At the time, perhaps, but now, being a homeowner, so forth, in Oakland. I'm very glad they're there."[15]

Given the nature of Shirley G.'s discussion of her past experiences with the police, the prosecutor's explanation for excluding this juror was clearly "inherently plausible and supported by the record." (*People v. Silva*, *supra*, 25 Cal.4th at p. 386.)

Melba B.

Melba B. was 80 years old, had arthritis and had indicated on her questionnaire that this "might physically cause her to be unable to sit as a juror." In chambers, she had said the arthritis would not prevent her from being a juror, although it might prevent her from sitting for a long period of time. The prosecutor noted that the trial was expected to last four weeks, there would be "a lot of walking up and down the stairs" and the testimony would require "much subtle concentration." He additionally stated that Melba B. was an ex-school teacher and that case law stated teachers tend to be liberal and "forgiving of children."

Appellants argue a juror's ability to walk up and down stairs is irrelevant to his or her ability to perform as a juror, pointing out that the Oakland courthouse has elevators. They note that Melba B. stated she felt she could be a fair, impartial juror. Additionally, appellants note that Trial Juror No. 3 was a school teacher but was not challenged by the prosecutor. Trial Juror No. 3 had recently begun to work as an assistant teacher, helping primarily with pre-kindergarten children.

Case law recognizes that a prosecutor's belief that teachers tend to be liberal or less oriented to the prosecution may be a race-neutral reason for a challenge. (*People v. Barber*, *supra*, 200 Cal.App.3d at p. 394.) Appellants' comparison of Melba B. to Trial

Juror No. 3 might raise some question as to the legitimacy of the prosecutor's explanation in this case, at least in light of the fact that the trial court accepted it at face value, because the record on appeal does not permit a true comparison: The record on appeal does not reflect what level of education Melba B. taught, or for how long, making it difficult to compare the likelihood of her being sympathetic toward appellants against the likelihood of such sympathy from Juror No. 3, who had only recently begun to work as a teacher's assistant with preschool-age children.

The prosecutor's main reason for excluding Melba B., however, was her physical condition. Although Melba B. stated under questioning that she felt able to participate as a juror, she had previously indicated that her arthritis might cause her some problems in this regard. The presence of elevators in the courthouse notwithstanding, the prosecutor was concerned that Melba B.'s arthritis might cause inconvenience and might interfere with the juror's concentration. The trial court obviously accepted the concern over Melba B.'s physical condition as a valid reason for excusing her, as this was the point upon which the court itself focused in its preliminary remarks concerning this juror. A concern that a juror might be uncomfortable, be caused inconvenience or cause inconvenience to others in a lengthy trial is a race-neutral reason for exercising a peremptory challenge and trial court was entitled to accept it as genuine.

Charles B.

The prosecutor viewed Charles B. as "a little bit off, a little bit weird" because, when the clerk began to call jurors' names, Charles B. yelled out "inappropriately" that the audience could not hear. Also, when Charles B.'s name was called, he approached and said "that's Charles [B.], Senior, kind of a cavalier way. Not Charles [B.] Junior." The prosecutor felt Charles B. might not get along with other jurors because "he seems to be kind of a cavalier guy." The prosecutor was also "greatly" concerned with Charles B.'s comment that his daughter had been "falsely accused of driving while Black" and

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15 Appellants also note that Shirley G. had previously served on two juries, one criminal and one civil, and that both had reached verdicts.

that this "happens frequently in society," which "implied a bias against police." The prosecutor realized Charles B. had said he could be fair and impartial but did not want to "take any chances." Acknowledging that Charles B. was a Republican, the prosecutor also noted that Charles B. had worked with the food stamp program, which suggested he might have a "more forgiving attitude of someone who might have been in a social or impoverished state."

Appellants take issue with the characterization of Charles B. as "weird." Appellants offer as an explanation of Charles B.'s comment that he was "Charles [B.], senior" not "junior" the fact that Charles B.'s son, Charles B., Jr., was sitting as a juror in one of the other courtrooms that day. They point to factors that appear to make Charles B. a good choice for a juror: He had served as a juror three times before, with the juries reaching verdicts in two of the trials and the third, a civil case, settling before the case was given to the jury; and his son had been the victim of a robbery.

While appellants have offered explanations for the conduct which caused the prosecutor to view Charles B. as "a little bit weird," the prosecutor was entitled to act on his feeling as long as it was not based on Charles B.'s race. Moreover, this was not the only reason the prosecutor offered for excusing Charles B. As indicated above, the prosecutor's impression that a person whose occupation involves the provision of social services might tend to be sympathetic to defendants from an impoverished background constitutes a race-neutral reason for a peremptory challenge. (*People v. Trevino, supra,* 55 Cal.App.4th at p. 411-412.) Moreover, although Charles B. stated that he would judge police officers' credibility the "same way" as anyone else's, he acknowledged that he would "look a little skeptical at the Oakland officers" in light of his daughter's experience, because "things like that continue to happen according to the papers." Appellants' assertion that the record does not support the prosecutor's reasons for excusing Charles B. is not persuasive.

Artena P.

The prosecutor gave two reasons for excusing Artena P. First, she had cerebral palsy, which caused her leg to fall asleep occasionally and caused pain in her back.

Although she had not had problems by the time of voir dire, because the trial was expected to be lengthy, the prosecutor was concerned about distractions caused by physical issues, as well inconvenience to everyone if Artena P. could not climb stairs and the possibility of having to reconstitute the jury if Artena P. had to be excused during trial. Additionally, the prosecutor felt Artena P. seemed "timid and very soft spoken" and stated he needed "people who are not going to waiver [*sic*]," people who were not going to sympathize with the defendants due to their age, "people who are able to make decisions and do it on a daily basis, people who work on a daily basis who are managers, who work within a corporate structure." Artena P. had not been able to work full time because of her physical condition, although she had worked part-time. Finally, the prosecutor stated that he had not rated Artena as highly as the prospective jurors who followed her.

As discussed above, the prosecutor was not required to accept Artena P.'s assertion that her physical condition would not interfere with her ability to sit as a juror. Given that the trial was to be a lengthy one, the prosecutor's concern that this juror might be distracted by physical issues, or that the situation might involve inconveniences for others, was a decidedly race-neutral one. There is no basis for questioning the trial court's acceptance of this explanation for the challenge to this juror. Appellants also argue that the prosecutor was inconsistent in excusing Artena P. because she appeared to lack decision-making and managerial skills while excusing Abubakar B. and Charles B. *despite* their appearing to have such skills. As previously discussed, however, the prosecutor stated other valid reasons for excusing Abubakar B. and Charles B. which were accepted by the trial court.

In sum, we find no basis in the record for finding the prosecutor's reasons for excusing the jurors in question either inherently implausible or unsupported by the record and no basis for overturning the trial court's acceptance of them. We note, in addition, that the jury ultimately seated in this case did include two African-Americans. "'While the fact that the jury included members of a group allegedly discriminated against is not conclusive, it is an indication of good faith in exercising peremptories, and an appropriate

factor for the trial judge to consider in ruling on a *Wheeler* objection. [Citations.]' (*People v. Turner, supra,* 8 Cal.4th at p. 168.)" (*People v. Trevino, supra,* 55 Cal.App.4th at p. 410.)

II.

Appellants next contend the trial court committed reversible error by admitting Jones's preliminary hearing testimony despite the prosecution's failure to exercise reasonable diligence to produce Jones as a witness at trial. They contend the prosecution did not exercise reasonable diligence because it did not begin its efforts to locate Jones until the case was set for trial and failed to take steps to prevent Jones from absenting himself. Appellants further argue that Jones's preliminary hearing testimony was unreliable because it was self-serving and Jones did not understand his duty as a witness to tell the truth, and that the hearing on the voluntariness of his testimony was incomplete without "his side of the story." Appellants argue the admission of Jones's preliminary hearing testimony violated their constitutional rights to confrontation and cross-examination, to due process and to a fair trial.

"The confrontation clauses of both the federal and state Constitutions guarantee a criminal defendant the right to confront the prosecution's witnesses. (U.S. Const., 6th Amend.; Cal. Const. art. I, § 15.)" (*People v. Cromer* (2001) 24 Cal.4th 889, 892.) "This confrontation right seeks 'to ensure that the defendant is able to conduct a "personal examination and cross-examination of the witness, in which [the defendant] has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."' (*People v. Louis* (1986) 42 Cal.3d 969, 982 . . ., quoting *Mattox v. United States* (1895) 156 U.S. 237, 242 . . . .) To deny or significantly diminish this right deprives a defendant of the essential means of testing the credibility of the prosecution's witnesses, thus calling 'into question the ultimate "'integrity of the fact-finding process.'"' (*Chambers v. Mississippi* (1973) 410 U.S. 284, 295 . . .)" (*People v. Cromer, supra,* 24 Cal.4th at pp. 896-897.)

An exception to the confrontation requirement has traditionally been found "'where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant [and] which was subject to cross-examination . . . .' (*Barber v. Page* [(1968)] 390 U.S. [719,] 722 . . . .) Before the prosecution can introduce testimony from a prior judicial proceeding, however, it 'must . . . demonstrate the unavailability of' the witness. (*Ohio v. Roberts* [(1980)] 448 U.S. [56,] 74.)" (*People v. Cromer, supra,* 24 Cal.4th at p. 897.)

In California, this exception for prior testimony is set forth in Evidence Code section 1291, subdivision (a), which allows admission of former testimony "if the declarant is unavailable as a witness and . . . [t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." A witness is unavailable if he or she is "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." (Evid. Code, § 240, subd. (a)(5).) Our Supreme Court has referred to the "reasonable diligence" requirement as "due diligence." (*People v. Cromer, supra,* 24 Cal.4th at p. 898.) Due diligence "'connotes persevering application, untiring efforts in good earnest, efforts of a substantial character.' (*People v. Linder* (1971) 5 Cal.3d 342, 346-347 . . . ; accord *People v. Sanders* [(1995)] 11 Cal.4th [475,] 523 . . .). Relevant considerations include '"whether the search was timely begun"' (*People v. Sanders, supra,* 11 Cal.4th at p. 523), the importance of the witness's testimony (*People v. Louis, supra,* 42 Cal.3d at p. 991), and whether leads were competently explored (*People v. Enriquez* [(1977)] 19 Cal.3d [221,] 236-237.)" (*People v. Cromer, supra,* 24 Cal.4th at p. 904.) Appellate courts "independently review a trial court's determination that the prosecution's failed efforts to locate an absent witness are sufficient to justify an

exception to the defendants' constitutionally guaranteed right of confrontation at trial." (*Id.* at p. 901.)[16]

On April 14, 1999, the trial court held a hearing to determine whether the prosecution had used reasonable diligence to procure Jones's attendance at trial. Inspector Frank Moshetti of the Alameda County District Attorney's Office testified that he took over appellants' case from Inspector Tom Gadsey on March 1, 1999. Gadsey had attempted to serve Jones with a subpoena on December 22, 1998, at 2107 89th Avenue in Oakland. An unidentified female indicated that Jones no longer lived at that address. Gadsey spoke by telephone with Jones's mother, Cheryl Lawson, who told him that she had evicted Jones from her house in Hayward and that she saw Jones occasionally but did not know exactly where he was living. On January 21, 1999, Gadsey attempted to serve Jones at his mother's address in Hayward. Jones's mother said Jones was scared and did not want to testify in this case, and that she did not know where he was. Gadsey requested and received from Lawson a recent photograph of Jones and left a business card with Lawson.

On February 5, 1999, Jones got into "some kind of a disturbance" with his mother and the Hayward police were called. Moshetti believed that Jones was not present when the police arrived. On February 19, Gadsey requested assistance from the Hayward Police Department in finding Jones and spoke with two detectives.

On February 23, Gadsey spoke with one of the detectives at the Hayward Police Department and again attempted to serve Jones at his mother's address. The family had moved, but Gadsey found Lawson across the street. She told Gadsey that she had told Jones that Gadsey wanted Jones to contact him. Lawson indicated that Jones was homeless and might be living out of a large gray American car with grill damage. That same day, Gadsey had the Hayward detective put out an all points bulletin for Jones.

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16 Under *Cromer*, if the facts underlying the prosecution's efforts are disputed, the appellate court must defer to the trial court's factual findings. (24 Cal.4th at p. 900.)

When Moshetti assumed the case on March 1, he reviewed the records relating to Jones, looking for investigative leads. He looked through the telephone book, contacted the Department of Motor Vehicles for information about the gray car, and consulted "CORPUS" and "RECAP," a computerized "listing of contacts throughout Alameda County." He then periodically checked these sources until the time of the hearing. On March 4, Moshetti went to Lawson's last address to confirm it was vacant and check the area for the gray car. On March 8 he contacted the Hayward detective and was informed there was no new information on Jones.

On March 12, Moshetti met with Lawson and her boyfriend in the prosecutor's office. Lawson "was outwardly voicing cooperation" but Moshetti believed she was not being "totally candid." She told Moshetti she had no contact with Jones and no idea where he was or who he might be with, but then said she would try to contact him over the weekend. Lawson was asked to call on Monday but did not do so; later in the week, Moshetti called her and she said she had not been able to contact Jones.

On March 22, Moshetti tried to call Jones's father but there was no answer and no answering machine. Moshetti contacted the Oakland Police Department and a daily bulletin was prepared and distributed to Oakland officers; the bulletin was also available to various other law enforcement agencies. Moshetti also contacted the father of one of Jones's "old associates," a Mr. Johnson. Johnson confirmed that Jones had been an associate of his son but did not believe his son was still in contact with him; he said he would check with his son and call if he discovered any information.

On March 23, Moshetti went to an address on 89th Avenue which he believed to be Jones's grandmother's and spoke with a person who said she was Jones's cousin. She indicated Jones was probably living with a girlfriend somewhere but she did not know where and had not seen him in awhile. She called Jones's mother, who was not able to provide any additional information, and called another unidentified person with no results.

Moshetti spoke with Lawson on March 24 and she had no information. On April 1, Moshetti went to an address he had located for Jones's father, but discovered the father

had moved some six months before. Moshetti determined that Jones was not in custody in Contra Costa, San Mateo or Santa Clara counties. His regular checks of the computer systems did not reveal any arrests for Jones and his contacts with a number of hospitals revealed no patients with Jones's name.

Moshetti was aware that Jones had been arrested the previous year in a felony theft case.[17] He acknowledged that no all points bulletin had been put out for Jones before the incident at his mother's house on February 5, 1999. While it was theoretically possible to send a teletype to various law enforcement agencies, this was most often done in a search for a missing person or a murder suspect and Moshetti had never seen it done for a reluctant witness.

Appellants contend that the prosecution was dilatory in that it made no efforts to secure Jones's appearance at trial between the time of his preliminary hearing testimony on October 16, 1996, and Gadsey's unsuccessful attempt to serve him with a subpoena on December 22, 1998. In *People v. Cromer, supra,* 24 Cal.4th at p. 904, upon which appellants rely for their argument that the search for Jones was not "timely begun," the prosecution lost contact with witness after the preliminary hearing and received word that she had disappeared within two weeks, but did not attempt to find her until months after the first date set for trial; it then failed to timely act on information received during the investigation. Here, there is no evidence the prosecution had reason to believe it would not be able to find Jones, or Jones would not be a cooperative witness, until it discovered in December 1998 that its information about Jones's address was no longer valid and learned from Jones's mother in January 1999 that Jones did not want to testify.

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17 The parties stipulated that Jones had been detained at a mall on April 26, 1998, and found to be in possession of a recently stolen jacket and a punch-type burglar tool. Two other young men with Jones also were in possession of recently stolen jackets; a car in the mall lot had been broken into and had three jackets taken from it; and a witness had seen the three young men next to the car, which had a broken window and pry marks on the door handle. Jones initially told the police he had found the jacket on the ground

People v. Louis, supra, 42 Cal.3d 969, another case upon which appellants rely, is also distinguishable. In *Louis*, the critical witness against the defendant, who was recognized by all to be lacking in trustworthiness and reliability, had been incarcerated on criminal charges but refused to testify at the codefendants' trial unless the prosecution agreed to release him after his testimony to spend the weekend with an unnamed friend at an unspecified location. The prosecutor struck this deal despite being aware the witness might disappear. (42 Cal.3d at pp. 989-993.) While Jones, too, was a critical witness whose credibility was clearly subject to challenge, unlike the situation in *Louis*, the prosecution here did not forego an opportunity to keep Jones in custody and did not knowingly take a risk of his disappearing before trial.

Appellants also argue the prosecution was dilatory in failing to request assistance from the Hayward police until February 19, 1999, and failing to arrange for issuance of an all points bulletin until February 23, 1999. Appellants suggest that if an all points bulletin had been issued sooner, Jones could have been held after the February 5, 1999, disturbance at his mother's house in Hayward. Moshetti testified, however, that he believed Jones was not present at his mother's house when the police arrived on February 5. Appellants presented no evidence at the hearing to refute this point, but simply argued that if an all points bulletin had been put out earlier, the Hayward police would likely have responded more quickly on February 5 and would have taken Jones into custody. This argument is completely speculative: There is no evidence that the existence of an all points bulletin would have caused the police to respond more quickly, or that Jones would still have been there when the police arrived. Nor do appellants explain how arresting Jones on February 5, 1999, would necessarily have secured his appearance at trial almost two months later. While the Penal Code provides for holding a material witness in custody under certain circumstances, such custody is subject to review every 10 days and may not be continued indefinitely. (§ 1332; *In re Francisco M.* (2001) 86

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outside the mall, then said his friend had given it to him but he did not know it was stolen. He said he had found the tool and did not know what it was.

Cal.App.4th 1061 [remanding for trial court to consider whether to extend detentions of eight weeks and ten weeks].)[18] Certainly, it is highly unlikely the material witness provisions of the Penal Code could have enabled the prosecution to "put a hold" on Jones after his arrest in April 1998 which would have secured his appearance at trial some 11 months later.

The prosecution began its efforts to secure Jones's testimony at trial some three months before the date trial actually began. As recognized in *People v. Hovey, supra*, the prosecution cannot reasonably be expected to keep "'periodic tabs' on every material witness in a criminal case, for the administrative burdens of doing so would be prohibitive[,]" and "it is unclear what effective and reasonable controls the People could impose upon a witness who plans to leave the state, or simply 'disappear,' long before a trial date is set." (44 Cal.3d at p. 564.) While the prosecution could have enlisted the help of the Hayward police earlier than it did, this help was requested, and the all points bulletin put out, more than a month before trial. The prosecution made a variety of efforts to locate Jones, including contacting people likely to know Jones's whereabouts and investigating with law enforcement agencies and hospitals. Its efforts were reasonable. (See, *People v. Wise* (1994) 25 Cal.App.4th 339.)

Appellants additionally argue that their constitutional rights to due process were violated by the admission of Jones's testimony because it was unreliable. They argue that Jones was unable to distinguish truth from falsehood and engaged in "creative story-telling" to escape responsibility for criminal offenses. They note Jones's testimony at the

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18 Appellants do not refer to section 1332 but rather to sections 878 through 881, which pertain to securing witnesses' attendance at a preliminary hearing and which prohibit holding a material witness in custody for more than 10 days. (§ 881; see, *People v. Hovey* (1988) 44 Cal.3d 543, 564 ["The material witness provisions of the Penal Code are limited to requiring a bond to secure the witness's appearance, and a maximum 10 days in custody for failure to post such a bond. See also Cal. Const., art. I, § 10, forbidding the unreasonable detention of witnesses.)" Italics omitted.].) Section 1332 does not contain the 10-day maximum, but does require review after 10 days. (*In re Francisco M., supra*, 86 Cal.App.4th at p. 1079.)

preliminary hearing that he told the police the truth "the whole time." Asked whether he had initially told the police he had not been at the building where the shooting occurred, Jones said, "The first time because I was scared." When asked, "So you did lie to them for a while?" Jones repeated, "I was scared . . . . Then I finally told the truth." At another point, Jones was asked whether it was a lie when he told the police he had not been to the house. He responded, "When I first said it, it was no lie. It was just that I said it because I was scared that something was going to happen to me. Then I thought about it, and I told the whole truth."

Appellants also assert that Jones's explanations to the police in connection with criminal offenses demonstrate a pattern of denying personal misconduct and attempting to shift blame to others. In April 1998, Jones was arrested with two others for burglarizing a car in a mall parking lot. Jones was found carrying a jacket taken from the car, with a spring punch tool that can be used to break tempered glass in his front pocket; his companions were each wearing or carrying a jacket taken from the car. Jones said he had found the tool on the ground and did not know what it was, and that he had found the jacket on the ground. He subsequently stated that one of his companions had given him the jacket and that he did not see where it came from.

In May 1995, a school counselor took Jones's hat off his head and several packets of cocaine fell out. Jones reportedly quickly picked up two of the packets and told the counselor they were "his candy"; the counselor found the other packet on her desk. Jones told the police that a friend had given him the cocaine to hold and he had put it in his pants pocket, then forgot the cocaine was in his pocket when he went to school and put it into his hat so he would not get into trouble. He said he gave the cocaine to another student and the police eventually retrieved it from a student to which it had been given. Jones told the probation officer that he took the drugs from his friend because he thought it would be "cool." At the preliminary hearing in the present case, when asked about the drug possession, Jones testified that some boys at school had "put it on me."

In April 1995, Jones was arrested for a hit and run when observed by a police officer leaving the scene of a car crash. He spontaneously stated to the officer that the car

was stolen and officers found a concealed, unloaded gun in the car. In his statement to the police, Jones said his friend had stolen the car two days before; Jones was present but did not help. Jones said he knew the gun was in the car but it was the friend's gun.

Appellants are correct, of course, that a trial court must exclude testimony from a witness who is incapable of understanding the duty of a witness to tell the truth. (Evid. Code, § 701; *People v. Ayala* (2000) 23 Cal.4th 225, 265; *People v. Mincey* (1992) 2 Cal.4th 408, 444.) "The party challenging the witness bears the burden of proving disqualification, and a trial court's determination will be upheld in the absence of a clear abuse of discretion." (*People v. Mincey, supra,* 2 Cal.4th at p. 444; see, *People v. Ayala, supra,* 23 Cal.4th at p. 265; *People v. Cudjo* (1993) 6 Cal.4th 585, 621-622.) "Moreover, to preserve for appeal a claim that a witness lacked testimonial competence, a party must object on this ground in the trial court." (*People v. Cudjo, supra,* 6 Cal.4th at p. 622.)

There is no indication in the record that appellants objected below to Jones's testimony on the ground that he was unable to comprehend his duty to tell the truth. Greene's motion to exclude Jones's testimony was based on the claim that Jones's police statement was involuntary, a point which will be discussed below. While defense counsel argued this point, as well as the issue of the prosecution's diligence in attempting to produce Jones as a witness, this court is unaware of any objection in the trial court to Jones's competence as a witness. In any event, we find nothing in Jones's preliminary hearing testimony or statements to the police to support the proposition that he was incapable of understanding the obligation of a witness to tell the truth. It is apparent that the credibility of Jones's statements would be open to great question, given his changes of story, his history of criminal conduct and attempts to evade responsibility for it, and the many inconsistencies in his account of the events of January 20, 1996, but these credibility issues do not bear on the fundamental question of his competence to testify.

Appellants also contend that their constitutional rights to cross-examination were violated by the use of Jones's preliminary hearing testimony, because although they were able to cross-examine Jones at the preliminary hearing, that hearing involved a lower standard of proof and there was a "presumption" that the witness would be available for

trial and subject to the jury's evaluation of his demeanor and credibility. This argument would suggest that preliminary hearing testimony can never be sufficient under Evidence Code section 1291, which is clearly not the case. (*People v. Cromer, supra,* 24 Cal.4th 889; *People v. Hovey, supra,* 44 Cal.3d at pp. 562-564.) While preliminary hearing testimony might not be admissible under Evidence Code section 1291 if the defense was precluded from conducting a full cross-examination at that hearing (see, *People v. Louis, supra,* 42 Cal.3d at p. 990 [cross-examination at preliminary hearing "frustrated to a certain extent by restrictions imposed by the magistrate"]), appellants make no claim that this was the case here. Defense counsel—the same counsel now representing appellants here—cross-examined Jones about his prior offenses and statements to the police concerning those offenses, about the changes in his story to the police regarding the shooting, and about his conduct on the night of the shooting and inconsistencies in his account.

Finally, appellants challenge the voluntariness of Jones's testimony. As indicated above, Jones completely changed his story during his police interview, first denying ever having been in the building and then giving the full account implicating appellants. This change occurred after a brief break in the police interview during which Jones was accompanied by one officer to get a drink of water. Appellants moved to exclude Jones's testimony from trial, arguing that the combination of Jones's change of story after an "unrecorded and unwitnessed interaction with Swisher" and the fact that Jones was never charged in these offenses despite the evidence that he was a participant, established a "prima facie case of involuntariness." The only witness at the hearing on appellants' motion to exclude Jones's testimony was Thomas Swisher. Appellants argue on appeal, as they did at trial, that Jones's statement could not be determined voluntary without Jones's testimony as to why he changed his story, and that they were denied their due process rights to a fair trial because they did not have an opportunity to cross-examine Jones outside the presence of the jury as to the voluntariness of his statement to the police.

Swisher testified that when he and Sergeant Olivas interviewed Jones at the police station on March 18, 1996, Jones initially denied knowing anything about the shooting or ever being in the building. The non-recorded portion of the interview began at 10:56 a.m. and was interrupted for two minutes when Swisher escorted Jones for a drink of water at 11:12 a.m. When the interview resumed at 11:14 a.m., Swisher showed Jones a photo line up that included his photograph and a page of the police report that listed his name as a witness. At this point, Jones admitted being present and told his story of the events of January 20, 1996. Swisher testified that the interview was "low-keyed," without "real challenging" or yelling, that he did not raise his voice before Jones changed his story, and that he never used physical abuse, threatened Jones or made any promises of leniency. He knew at the time of the interview that Jones was on probation.

Appellants' challenge to the voluntariness of Jones's statement to the police assumes that something may have been done during the two-minute period that Jones was alone with Swisher to coerce Jones to retract his denial of knowledge of the shooting and provide the story that implicated appellants. Swisher, of course, was questioned on this point both at the hearing on the motion to exclude Jones's testimony and at trial. Moreover, Jones himself was specifically questioned on this point at the preliminary hearing and testified that Swisher did not say anything to him during the water break.[19] Appellants offer no reason to suspect Jones's testimony would have been any different if he had been available for questioning at the hearing on the voluntariness of his statement.

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19 The following exchange occurred on cross-examination by Greene's attorney:
"Q. And then one of the policemen took you out of that room; didn't he?
"A. Yes.
"Q. And then he had a little conversation with you when he took you out of that room, didn't you talk—
"A. He didn't have a conversation with me.
"Q. Did he talk to you at all?
"A. In the inside.
"Q. When they took you out of the room, down the hall, did he talk to you or did he not say one word?

III.

Appellants contend reversal is required because the trial court denied their motion to remove Juror No. 10. After Mouton's mother, Dorothea Smith, testified, Juror No. 10 heard her comment, "I did good." The juror submitted a note to the court and was questioned about the incident by the court and counsel. The juror stated that she had not mentioned the incident to anyone and that she did not think she would consider it in making determinations about the facts and issues in the case or in making assessments about credibility. Juror No. 10 inferred from the comment that Smith "was a mother concerned about her son."

Defense counsel sought to have Juror No. 10 removed as a precaution, suggesting that although the juror did not appear to have taken it this way, Smith's comment implied "I put on a performance." The trial court denied the motion; admonished the juror not to discuss the case or to consider anything other than the evidence presented in court; and elicited the juror's promise not to allow the incident to enter her "discussions, deliberations, or . . . thought processes" in deciding the case.

"A defendant accused of a crime has a constitutional right to a trial by unbiased, impartial jurors. . . . '"Because a defendant charged with a crime has a right to the unanimous verdict of 12 impartial jurors [citation], it is settled that a conviction cannot stand if even a single juror has been improperly influenced." [Citations.]'" (*People v. Nesler* (1997) 16 Cal.4th 561, 578.) Under section 1089, a trial court may discharge a juror during trial for "good cause." "Good cause" under section 1089 includes "serious and willful misconduct." (*People v. Daniels* (1991) 52 Cal.3d 815, 866; see, *People v. Guzman* (1977) 66 Cal.App.3d 549.)

Inadvertent receipt by a juror of information not presented in court "falls within the general category of 'juror misconduct' and "gives rise to a presumption of prejudice, because it poses the risk that one or more jurors may be influenced by material that the defendant has had no opportunity to confront, cross-examine, or rebut." (*People v.*

"A. He didn't say nothing."

Nesler, supra, 16 Cal.4th 561, 579-580.) "The court's decision whether to discharge a juror under section 1089 is reviewed for abuse of discretion. [Citations.] The juror's inability to perform must appear as a 'demonstrable reality' and will not be presumed. [Citations.]" (*People v. Lucas* (1995) 12 Cal.4th 415, 489; see, *People v. Bowers* (2001) 87 Cal.App.4th 722, 729.)

Here, Juror No. 10 overheard a comment to which she did not attach any great significance or sinister implication. She had not discussed the incident with anyone else. She told the court she did not think the incident would affect her deliberations and promised not to consider it in her thinking about the case. The record reflects no "demonstrable reality" that Juror No. 10 would be unable to perform her duties. We find no abuse of discretion in the court's decision to allow her to remain on the jury.

IV.

Appellants next contend the trial court erred in denying their motion for a mistrial after the prosecutor deliberately and unnecessarily elicited from an expert witness testimony that she obtained their fingerprint exemplars from police department files. Appellants claim this testimony was prejudicial because it allowed the jury to infer they had criminal records.

As described above, criminalist Jennifer Hannaford testified that a fingerprint on the liquor box found in Mouton's apartment belonged to Carroll and a fingerprint on the underside of the lid of the cartridge box found in Mouton's apartment belonged to Mouton. Hannaford's examination of the fingerprints was conducted on March 25, 1996. She testified that she compared the fingerprints taken collected as evidence in this case with known fingerprints of six individuals: Appellants, Jones, Omar Smith, and Antoine Carroll. Asked by the prosecutor where she obtained the fingerprint exemplars, Hannaford testified, "We have exemplar prints from the Oakland Police Department and we just took them from the files."

After Hannaford's testimony, appellants requested a mistrial, arguing that Hannaford's last quoted testimony was prejudicial in that it informed the jury that appellants had prior arrest records. Appellants pointed out that the testimony was

unnecessary, because the defense had stipulated that the fingerprint exemplars belonged to the individuals Hannaford named. The prosecutor argued that an inference of prior arrests was not the only one that could be drawn from the testimony, as the jury did not know whether appellants were required to provide fingerprints to the police in connection with the investigation of the present case. The court noted that the defense argument was not that an inference of prior arrests necessarily had to be drawn from the testimony, but that the testimony was sufficient to raise such an inference. The court indicated the problem could be cured with a cautionary instruction; Carroll's attorney suggested this would be worse than saying nothing, as it would highlight testimony the jurors might not have heard. Subsequently, the court suggested an instruction that would have directed the jurors not to be "influenced by any reference which may have been made by a witness regarding any previous contact or record with any police agency which may be been referred to by a—or any witness concerning a defendant, or something like that . . . ." Defense counsel did not want such an instruction given and the court acceded to their position. The mistrial motion was denied.

"'A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. (*People v. Woodberry* (1970) 10 Cal.App.3d 695, 708.) Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.' (*People v. Haskett* (1982) 30 Cal.3d 841, 854 . . .]; see also *People v. Stansbury* (1993) 4 Cal.4th 1017, 1060 . . . ; *People v. Cooper* (1991) 53 Cal.3d 771, 838-839 . . . ; *People v. Wharton* (1991) 53 Cal.3d 522, 565 . . . .)" (*People v. Hines* (1997) 15 Cal.4th 997, 1038.)

Appellants argue that the testimony elicited from Hannaford was extremely prejudicial because it allowed the jury to infer that they had prior criminal contacts, probably arrests or convictions. As none of the appellants testified at trial, there was no other occasion for the jury to hear evidence that any of them had prior criminal records.[20]

Further, appellants maintain that no cautionary instruction could have cured the harm stemming from the testimony.

"'Evidence that involves crimes other than those for which a defendant is being tried is admitted only with caution, as there is the serious danger that the jury will conclude that defendant has a criminal disposition and thus probably committed the presently charged offense. [Citations.]' (*People v. Thompson* (1988) 45 Cal.3d 86, 109 . . .)" (*People v. Calderon* (1994) 9 Cal.4th 69, 75.) "Evidence of uncharged offenses 'is so prejudicial that its admission requires extremely careful analysis. [Citations.]' (*People v. Smallwood* (1986) 42 Cal.3d 415, 428 . . . ; see also *People v. Thompson, supra,* 45 Cal.3d 86, 109 . . . .) 'Since "substantial prejudicial effect [is] inherent in [such] evidence," uncharged offenses are admissible only if they have substantial probative value.' (*People v. Thompson* (1980) 27 Cal.3d 303, 318 . . . , fn. omitted.)" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404.)

There can be little doubt that Hannaford's testimony would support an inference that appellants had criminal records of some sort: It is easy to imagine a juror concluding that since Hannaford obtained the fingerprint exemplars from "police department files," appellants must have at least been arrested in the past. As the prosecutor argued at trial, however, this is not the *only* inference a juror could have drawn from the testimony. At least in the cases of Greene and Mouton, who had been arrested several days before Hannaford undertook her examination of the evidence, a juror could just as easily have inferred that the fingerprints were in the files because they had been taken at the time of appellants' arrests.[21] Hannaford's remark was ambiguous; she did not expressly testify that appellants had, in fact, been charged with or convicted of crimes in the past.

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20 According to the probation reports, Greene had one prior conviction for possession of cocaine; Mouton had two juvenile offenses and Carroll had a juvenile referral that did not result in findings under Welfare and Institutions Code section 602.

21 Carroll was not arrested until well after Hannaford's examination of the fingerprints.

Without question, there are cases in which an admonition to the jury could not cure the prejudice resulting from improper evidence and in fact might exacerbate it; as appellants correctly argue, defense counsel in such circumstances may reasonably decline a cautionary instruction to avoid drawing attention to the problematic evidence. (*People v. Bolton* (1979) 23 Cal.3d 208, 215; *People v. Medina* (1995) 11 Cal.4th 694, 740.) The trial court felt this was not such a case and proposed an admonition that would have directed the jury not to be influenced by any reference that might have been made regarding any previous contact of the appellants with the police. Given the ambiguity of Hannaford's testimony, we can find no abuse of discretion in the court's conclusion that the testimony was not incurably prejudicial and that a mistrial was not warranted. Similarly, we cannot accept appellants' contention that the admission of this evidence rendered the trial so "fundamentally unfair" as to violate due process. (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384; *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 919.)

V.

Appellants next contend reversal of their convictions is required due to prosecutorial misconduct in closing argument. Appellants assert that the prosecutor improperly expressed his personal opinion that appellants were guilty, offered inadmissible "expert opinion" and appealed to the jury's passions and prejudices by telling the jury that appellants were friends and fit the "profile" of people who would commit robberies together, misled the jury as to the definition of reasonable doubt and misstated the law regarding circumstantial evidence.

Appellant's first point is that the prosecutor improperly expressed a personal opinion by telling the jury, "'I'm confident . . . these people are guilty beyond a reasonable doubt.' 'When arguing to the jury, it is misconduct for a prosecutor to express a personal belief in the defendant's guilt if there is a substantial danger that the jurors will construe the statement as meaning that the belief is based on information or evidence outside the trial record (*People v. Bain* (1971) 5 Cal.3d 839, 848 . . .), but expressions of belief in the defendant's guilt are not improper if the prosecutor makes clear that the

belief is based on the evidence before the jury (*People v. Miranda* (1987) 44 Cal.3d 57, 110 . . . .)'" (*People v. Mayfield* (1997) 14 Cal.4th 668, 781-782.)

At the point the challenged remark was made, the prosecutor was discussing evidence tending to suggest Jones was an accomplice in these offenses. The prosecutor stated, "Again, it doesn't matter to the prosecution. You will make the decision, ultimately. [¶] Bear in mind, I will ask you to assume he is an accomplice because I want to make sure you go through all the steps. I'm confident, as I said in opening statement, even if he is, these people are guilty beyond a reasonable doubt." Shortly thereafter, at a break, defense counsel asked for a mistrial on the basis that the prosecutor had stated a personal belief in appellants' guilt. The prosecutor conceded that he had misspoken and argued that he had told the jury repeatedly that "it's their decision." The prosecutor agreed to "clean it up" and when the jury returned stated: "Before the break, I was talking about accomplice, whether he was an accomplice or not. And it's your decision. I think I made that fairly clear. I may have misspoke, also, and said, I am confident if you find he is an accomplice, you'll find that these defendants are guilty beyond a reasonable doubt. [¶] My opinion is irrelevant as a statement as an attorney. What I meant to say, I'm confident, even if you find he is an accomplice, you'll find that these defendants are guilty."

Subsequently, the trial court denied the motion for a mistrial and defense counsel requested that the jury be admonished that it is misconduct for a district attorney to express a personal belief in a defendant's guilt and jury misconduct for the jury to consider any such opinion. Over the prosecutor's objection, the court instructed the jury after the conclusion of counsel's arguments, that "it would be inappropriate for a district attorney to express a personal belief in the guilt of a defendant, and it would be jury misconduct for you to consider such an opinion, that is, if such an opinion was expressed."

The combination of the prosecutor's remarks and court's instruction clearly cured any impropriety in the challenged statement. The prosecutor's explanatory remarks alone would have been sufficient to dispel any improper inference that could have been drawn

from the initial comment. The court's curative instruction removes any doubt that the jury could have misunderstood the prosecutor's comment. Additionally, the jury had been instructed before closing argument that "statements made by the attorneys during the trial are not evidence."

Appellants' second point is based on the prosecutor's comments that appellants were "best friends on the day in question," had known each other since they were children, spent a lot of time together, and "fit a profile of some people who might commit robberies together." After noting the evidence that appellants were close friends and "hung out" together, the prosecutor explained, "Why is that important? This is a group robbery. If you do a robbery in a group, you don't do it with strangers, you do it with people you trust. Why is it that to do a robbery you have a partner? This is all common sense. That's why you are here. It's common sense. You need, if something goes wrong in the robbery, someone to think how you think, a friend who thinks how you think. Also, you have to think if you get caught, that person is not going to turn you in. [¶] This is circumstantial evidence. But it's important because these three guys didn't just happen to be there at the apartment that night. They were pals and they hung out and they did things together. We are going to talk about other things they did a little bit later. [¶] That's a piece of circumstantial evidence that suggests it wasn't a coincidence the three were together with [Jones]. They fit a profile of some people who might commit robberies together."

Appellants again requested a mistrial, arguing that the prosecutor was acting as an expert on crime. After the court denied the motion, there was no request for any admonition to the jury regarding the challenged comments. This failure to request an admonition waived the issue. (See, *People v. Mayfield, supra,* 14 Cal.4th 668, 753.) In any event, while the prosecutor referred to a "profile" of people who might commit a robbery, his remarks made clear that the significance of appellants' friendship as circumstantial evidence was a matter of "common sense." Appellants suggest that the prosecutor's remarks were racially motivated and an appeal to the jury's passions and prejudices because the only things appellants had in common were that "they were

young, African-American males who lived in a crime-ridden neighborhood." The gist of the remarks, however, was simply that the fact of appellants' friendship suggested a level of trust that "fit" the fact that the offenses here stemmed from a group robbery.

Appellants also assert that the prosecutor misled the jury as to the definition of reasonable doubt. They cite the prosecutor's argument that defense counsel had tried to portray the reasonable doubt standard as so high as to be unattainable and that counsel for Carroll had asked the jury to consider the "old standard" for reasonable doubt, referring to "moral certainty," which was no longer the law. The challenged remarks occurred during the following portion of the prosecutor's argument: "Each of the defense attorneys has attempted to make that standard seem to you so high, so unattainable that there is no way that you can come to a verdict of guilty in this case. [¶] They want you to believe that it's as high as the ceiling, that the prosecution's burden isn't possible. . . . [¶] They want you to believe that it's so high and so difficult to reach, you'll have to throw your hands up and say, 'ah, I just can't find a guilty verdict.' [¶] This is the same burden of proof that's used every single day in criminal courts across the United States of America. [¶] [Carroll's attorney] wants you to think about the Scottish burden of proof and not proved. And he also wants you to think about the old standard in terms of reasonable doubt. [¶] He mentioned 'moral certainty.' That's not the law today. That's not the standard of proof. [¶] Why are they doing that? Ladies and Gentlemen, reasonable doubt is a shield for the innocent; it is not a loophole for the guilty."

Appellants cite no case law to support their contention that the prosecutor's references to the defense argument on reasonable doubt was improper. Nor do they explain how a prosecutor's argument that proof beyond a reasonable doubt is not an insurmountable burden is misleading. Defense counsel each argued that the jury should find reasonable doubt as to appellants' guilt. Appellants apparently view the prosecutor as having misled the jury by suggesting that defense counsel had misrepresented the law. The prosecutor did not so charge defense counsel; he simply argued that the prosecution's burden was not as high as defense counsel would want the jury to believe. As for the prosecutor's comment on Carroll's attorney's reference to "moral certainty,"

the prosecutor was correct that under current law, the concept of reasonable doubt is defined without reference to "moral certainty."

Finally, appellants complain that the prosecutor misstated the law of circumstantial evidence by telling the jury to "consider each piece of circumstantial evidence in the 'totality of the circumstances,' so that if there was an innocent explanation for numerous pieces of evidence they could still find the defendants guilty." The challenged portion of the prosecutor's argument was directed toward what he described as the defense position that each piece of circumstantial evidence in the case, in isolation, was susceptible of an innocent explanation. The prosecutor argued: "But that's not what you're going to do as jurors. You are going to look at the totality of the circumstances, everything together, and then it's not so coincidental that all of these pieces of circumstantial evidence and direct evidence point to the same thing. . . . You cannot take each piece of circumstantial evidence alone, go back in the jury deliberation room and come up with reasonable interpretation for each piece. But when you put it altogether [*sic*], too many coincidences means it's not a coincidence and everybody knows that in life." Defense counsel argued to the court that the prosecutor had misstated the law, because "the instruction and the law specifically says you look at each piece of circumstantial evidence and analyze it, whether it goes towards guilt or innocence. And if both are reasonable, you must adopt the reasonable."

Again, appellants cite no case law to support their challenge to the prosecutor's remarks. Nor do they explain how the prosecutor's remarks were inconsistent with the legal requirements for circumstantial evidence. CALJIC No. 2.01 states: "[A] finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion. [¶] Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must

be proved beyond a reasonable doubt. [¶] Also if the circumstantial evidence permits two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation that points to the defendant's innocence, and reject that interpretation that points to his guilt . . . ."

This instruction directs the jury to consider all the circumstantial evidence and determine whether the "circumstances" shown by the evidence can be reconciled with an innocent explanation. We are aware of no requirement that the jury must analyze each piece of circumstantial evidence separately, divorced from all other evidence in the case. (*People v. Diaz* (1992) 3 Cal.4th 495, 536 [presence of certain piece of evidence in defendant's home, with possible innocent explanation, was "link in the circumstantial chain of evidence" identifying defendant as murderer and "considered in its entirety, the evidence pointed unerringly to defendant as the killer"].)

VI.

Appellants were convicted of first degree murder on the theory of felony murder, under which the jury had to conclude that the killing occurred as a "direct causal result" of the robbery in which appellants participated. The jury's verdicts indicate that it found Carroll was the person who actually killed the victim: The jury found that Carroll personally used a firearm in the commission of the offenses but rejected the allegations that Mouton or Greene were armed. Appellants Greene and Mouton maintain the jury should have been instructed that it could find appellants guilty of murder only if it concluded that the killing was committed in furtherance of appellants' common design, and that the failure to so instruct was prejudicial because the evidence would likely have led the jury to conclude the killing did not further the underlying robbery.

The jury was instructed as follows:

"The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs as a direct causal result of robbery is murder of the first degree when the perpetrator had the specific intent to commit that crime.

"The specific intent to commit robbery and the commission or attempted commission of such crime must be proved beyond a reasonable doubt.

"For purposes of determining whether an unlawful killing has occurred during the commission or attempted commission of a robbery, the commission of the crime of robbery is not confined to a fixed place or a limited period of time.

"If a human being is killed by any one of several persons engaged in the commission or the attempted commission of the crime of robbery, all persons, who either directly and actively commit the act constituting that crime, or who with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging, or facilitating the commission of the offense, aid, promote, encourage, or instigate by act or advice its commission, are guilty of murder of the first degree, whether the killing is intentional, unintentional or accidental.

"In order to be guilty of murder, as an aider and abettor to a felony murder, the accused and the killer must have been jointly engaged in the commission of the robbery at the time the fatal wound was inflicted. However, an aider and abettor may still be responsible for the commission of the underlying robbery based upon other principles of law which will be given to you."

Under these instructions, the jury was informed that it could find appellants guilty of first degree murder as aiders and abettors if the killing occurred "as a direct causal result of robbery" and they and the killer were "jointly engaged in the commission of the robbery at the time the fatal wound was inflicted." The jury was not told that liability could attach to appellants only if the killing was in furtherance of the common design to commit a robbery.

In *People v. Pulido* (1997) 15 Cal.4th 713, the Supreme Court explained that its past "formulations of the rule establishing complicity of one robber in another robber's homicidal act have varied in their precise language and perhaps in the exact scope of complicity intended." (*Id.* at p. 720.) Under one line of cases, "the killing must be committed 'in furtherance of their common purpose to rob.'" (*Ibid.*; see, *People v. Vasquez* (1875) 49 Cal. 560, 563; *People v. Washington* (1965) 62 Cal.2d 777, 783.) Other cases "appear to state a broader rule of felony-murder complicity, under which the killing need have no particular causal or logical relationship to the common scheme of

robbery; accomplice liability attaches, instead, for any killing committed while the accomplice and killer are 'jointly engaged' in the robbery." (*People v. Pulido, supra,* 15 Cal.4th at p. 722; see, *People v. Martin* (1938) 12 Cal.2d 466, 472; *People v. Perry* (1925) 195 Cal. 623, 637-638.) *People v. Pulido* neither disapproved one of these lines of cases nor resolved the conflict between them. *Pulido* involved a question concerning the liability of an individual who aids and abets a robber in the asportation of security of stolen property *after* a killing has occurred in the perpetration of the robbery. *Pulido*'s conclusion that liability for first degree murder does not attach to such a late-joining aider and abettor did not require the Court to resolve any issues concerning the scope of complicity reflected in the lines of cases described above because liability would not extend to such an aider and abettor under either of the two approaches. (15 Cal.4th at p. 722.)

Appellants argue that *Pulido* "made it clear it favored the narrow rule of felony murder accomplice liability" because the decision emphasized criticisms of a case that applied the broad rule and because the opening paragraph of the opinion employs the language of the narrower rule to describe felony murder complicity liability. On the first point, *Pulido* began its discussion with the statement that "[u]nder long-established rules of criminal complicity, liability for [felony] murder extends to all persons 'jointly engaged at the time of such killing in the perpetration of or an attempt to perpetrate the crime of robbery' (*People v. Martin, supra,* 12 Cal.2d 466, 472 . . .) 'when one of them kills while acting in furtherance of the common design.' (*People v. Washington* (1965) 62 Cal.2d 777, 782 . . .)" (*People v. Pulido, supra,* 15 Cal.4th at p. 716.) This passage actually quoted cases representative of each of the two lines of authority the *Pulido* court went on to describe. On appellants' second point, *Pulido* noted a court of appeal case, *People v. Cabaltero* (1939) 31 Cal.App.2d 52, 61, which "explicitly distinguished the two complicity rules" and applied the felony murder rule to a participant in a robbery whose companion "impulsively shot and killed a third member of the group." *Pulido,* in a footnote, noted that *Cabaltero* had been criticized for "substituting the 'mere coincidence of time and place' for what should be a required causal relationship between

planned felony and killing.'" (*Pulido, supra*, 15 Cal.4th at p. 722, fn. 2.) *Pulido* did not, however, disapprove any of the cases espousing the broader rule of liability.

In *People v. Smithson* (2000) 79 Cal.App.4th 480, a defendant who was convicted as an aider and abettor to a robbery argued that the felony murder rule should not be applied to him because the killing occurred accidentally. He argued that *Pulido* demonstrated "an intent to narrow the judicially created scope of the felony murder rule" by showing "an intent to favor" the line of cases describing the narrower scope of felony murder complicity liability. (*Smithson, supra,* 79 Cal.App.4th at p. 500-501.) *Smithson* rejected this argument, explaining that because *Pulido* "did not disapprove either line of felony-murder cases, both are still valid and we are duty-bound to comply with the Supreme Court's directives in each. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Felony-murder liability would clearly attach to [the defendant] under the *Martin-Perry* line of cases. The killing occurred while both defendants were jointly engaged in the commission of a robbery." (*Smithson, supra,* 79 Cal.App.4th at p. 501, italics omitted.) *Smithson* then went on to note that even if the *Martin-Perry* line of cases were no longer controlling, the defendant would have been guilty under the narrower rule of complicity because the victim was killed, albeit accidentally, while the killer was acting in furtherance of the common design to rob.

Similarly, in the present case, liability would attach to appellants under either line of Supreme Court authority. The evidence showed that Gil ran up the stairs as he and Rodriguez were accosted by appellants at gunpoint; Carroll—who was found by the jury to have been the shooter—immediately followed Gil as the other appellants proceeded to rob Rodriguez. The jury was instructed that it could find appellants guilty of felony-murder as aiders and abettors only if they and the killer were "jointly engaged in the commission of the robbery at the time the fatal wound was inflicted." Given this instruction, the jury could not have convicted if it believed Carroll was no longer a participant in the robbery at the time he shot Gil. Moreover, the jury was instructed that liability could attach only if the killing occurred "as a direct causal result of robbery." The criticism discussed in *Pulido* of the broad rule of felony-murder liability was based

on that rule encompassing situations in which one of the accomplices acts impulsively and independently, so that there is no causal relationship between the original plan and the killing. (*Pulido, supra,* 15 Cal.4th at p. 722, fn. 2.) Under the jury instructions in this case, the jury necessarily found there was a causal connection between the robbery and the shooting. If the jurors had believed that Carroll broke from the plan he shared with appellants to rob the victims and set off on an independent mission to shoot Gil, they could not have found that the shooting was a direct causal result of the robbery. From the jury's determinations that Carroll was jointly engaged in the commission of the robbery when he shot Gil and that the shooting was a direct causal result of the robbery, it follows that the jury believed Carroll was acting in furtherance of the robbery when he shot Gil.

VII.

Appellants contend the trial court committed reversible error by instructing the jury with CALJIC No. 17.41.1. They maintain this instruction unconstitutionally undermines the secrecy of jury deliberations, chills speech during deliberations and violates the jury's right to nullify.

CALJIC No. 17.41.1 provides: "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation."

The issue of the propriety of CALJIC No. 17.41.1 is currently before the California Supreme Court in *People v. Engleman* (S086462). Accordingly, we decline to undertake an independent analysis of the issue here. Appellants' contention that the giving of the instruction constituted structural error requiring automatic reversal was squarely rejected in *People v. Molina* (2001) 82 Cal.App.4th 1329, 1332-1335. Rather, the instruction is subject to harmless error analysis under *Chapman v. California (1967) 386 U.S. 18.* (*People v. Molina, supra,* 82 Cal.App.4th at p. 1335.) In the present case, there is no indication CALJIC No. 17.41.1 had any effect on any juror, no indication any

juror was refusing to follow the law, intending to decide the case on an improper basis or engaging in other misconduct. There is no evidence of any prejudice to appellant from the giving of CALJIC No. 17.411.1.[22]

VIII.

Appellant Mouton argues reversal of his convictions is required due to the trial court's denial of his motion for a new trial. Mouton moved for a new trial on the ground that the trial court erred in failing to discharge Juror No. 10. He also joined the new trial motion made by appellant Greene, which argued that appellant was denied a representative juror by the prosecutor's discriminatory use of peremptory challenges; that the prosecutor knowingly presented testimony that was untruthful in relevant parts;[23] that the prosecutor misstated the law regarding evaluation of circumstantial evidence; and that the prosecutor improperly expressed his personal belief in appellant's guilt.

"'"The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears."' [Citations.]" (*People v. Delgado* (1993) 5 Cal.4th 312, 328.) As discussed in preceding sections of this opinion, we have found no error in the trial court's rulings on any of these issues. It follows that we can find no abuse of discretion in the trial court's denial of the new trial motion.[24]

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22 The author of this opinion, without the concurrence of other members of the panel, continues to hold the view that CALJIC No. 17.41.1 unconstitutionally encourages "intrusive judicial inquiries into the substance of the jury's deliberations" (*U.S. v. Thomas, supra*, 116 F.3d at p. 622) and threatens a defendant's right to a unanimous verdict.

23 This claim relates to Jones's testimony, which appellant maintained was blatantly false as to his role in the incident and denial of agreement with the robbery plan, and Swisher's testimony, which appellant maintained was "less than candid" in denying that Jones was a suspect at the time of his police interview.

24 The only issue underlying the new trial motions that has not been raised as a separate issue on appeal is that concerning the prosecutor's alleged knowing presentation

IX.

Appellants next contend that the trial court erred in imposing a 15 percent limit on presentence conduct credits under section 2933.1. Appellants maintain that section 2933.1 cannot be applied to defendants convicted of murder because the credit calculation for murderers is set forth in section 190. Section 190 was adopted by initiative and, appellants argue, cannot be amended except with the approval of the electorate.

At the time of appellants' offenses, section 190 provided: ". . . Article 2.5 (commencing with section 2930) of Chapter 7 of Title 1 of Part 3 shall apply to reduce any minimum term of 15, 20 or 25 years in the state prison imposed pursuant to this section, but the person shall not otherwise be released on parole prior to that time." (Stats. 1993, ch. 609, § 3, p. 3266; Prop. 179, approved by voters June 7, 1994.) At that time, article 2.5 contained only sections 2930, 2931 and 2932, governing the reduction of prisoners' sentences by one-third for good behavior and participation.

Section 2933.1, which became effective on September 21, 1994, provides in pertinent part: "Notwithstanding any other law, any person who is convicted of a felony offense listed in Section 667.5 shall accrue no more than 15 percent of worktime credit, as defined in Section 2933."

As appellants recognize, murder is an offense listed in section 667.5. (§ 667.5, subd. (c)(1).) Accordingly, appellants' offense would appear to be subject to the limitation of section 2933.1, which would result in appellants being entitled to fewer conduct credits than they would have been entitled to under section 190 as it existed at the time of their offenses.

Section 190 was adopted as an initiative measure. Appellants rely upon the principle that "a statute enacted by the electorate as an initiative measure may be changed

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of false testimony. As appellant has presented no argument or authority in support of his argument that the new trial motion should have been granted on this basis, we will not consider the issue. (*People v. Catlin* (2001) 26 Cal.4th 81, 133; *People v. Hardy* (1992) 2 Cal.4th 86, 150.)

only with the approval of the electorate unless the initiative measure itself permits amendment or repeal without voter approval. (Cal. Const., art. II, § 10(c).)" (*People v. Oluwa* (1989) 207 Cal.App.3d 439, 445-446.) Section 190 did not so provide. (*Id.* at p. 446.) Since section 2933.1 was not approved by the voters, appellants argue it cannot be applied to alter the credit calculation from that specified in section 190.

People v. Oluwa considered the application of section 2933, which provided for greater credits than allowed under section 190 and which was enacted subsequent to section 190. *Oluwa* first applied the principle that "where a statute adopts by specific reference the provisions of another statute, regulation, or ordinance, such provisions are incorporated in the form in which they exist at the time of the reference and not as subsequently modified . . . " (*Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 58) and concluded that the reference to article 2.5 in section 190 was a specific reference. The court then emphasized that the analysis given to the voters who approved section 190 advised that individuals sentenced to 15 years to life would have to serve at least 10 years before becoming eligible for parole, so that it would contravene the voters' intent to increase the number of credits such individuals could earn. (207 Cal.App.3d at p. 445, italics omitted.) *Oluwa* concluded that allowing the defendant to benefit from application of section 2933 would permit the Legislature to amend section 190 by reducing the amount of time a murderer must serve before becoming eligible for parole, and that the Legislature "should not be permitted to do indirectly that which it cannot do directly." (*Id.* at p. 446.) Finally, responding to an argument that an amendment to section 190 by the electorate in 1988 authorized the application of section 2933, which had since been enacted, *Oluwa* held that "the Legislature and the electorate, by taking steps to increase minimum terms for second degree murderers of peace officers and preventing such persons from earning any prison credits at all, could not have intended by the same stroke to increase the amount of credits other second degree murderers might earn."

The present case, like *Oluwa*, involves a statute added to article 2.5 after the adoption of section 190, without the voters' approval. The cases, however, are distinguishable. First, case law since *Oluwa* casts doubt upon the application of the

principle by which *Oluwa* determined that the electorate, in section 190, intended to allow prisoners credit according to the provisions of article 2.5 only as it then existed, containing only sections 2930, 2931 and 2932. In addition to the rule of construction relied upon in *Oluwa*, "[t]here is a converse rule 'that where the reference is general instead of specific, such as . . . to a system or body of laws or to the general law relating to the subject in hand, the referring statute takes the law or laws referred to not only in their contemporary form, but also as they may be changed from time to time . . . . [Citations.]' (*Palermo, supra,* 32 Cal.2d at p. 59.)" (*In re Jovan B.* (1993) 6 Cal.4th 801, 816.) "[W]here the words of an incorporating statute do not make clear whether it contemplates only a time- specific incorporation, 'the determining factor will be . . . legislative intent . . . .' (*People v. Domagalski* (1989) 214 Cal.App.3d 1380, 1386 . . . .)" (*Ibid.*)

In *People v. Jones* (1995) 11 Cal.4th 118, 123-124, the Supreme Court held that language of reference in Welfare and Institutions Code section 3201 that was almost identical to that in section 190—"including application of good behavior and participation credit provisions of Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 of the Penal Code. . ."—did *not* constitute a specific reference. *Jones* distinguished *Oluwa*, as differing in substance from the statute at issue in *Jones*. (11 Cal.4th at p. 124, fn. 3; see also, *People v. Eddy* (1995) 32 Cal.App.4th 1098, 1105-1106.)[25] *People v. Eddy, supra,* 32 Cal.App.4th at p. 1106, stated: "Welfare and

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25 *Jones* considered the application of Welfare and Institutions Code section 3201, subdivision (c), which provides that the maximum time for which a convicted felon may be committed to the California Rehabilitation Center is the period he or she would have spent in state prison if sentence had been executed, "including application of good behavior and participation credit provisions of Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 of the Penal Code. . ." Section 2931, one of the statutes included in article 2.5, at the time Welfare and Institutions Code section 3201 was adopted, provided for credits for good behavior and for participation. After the adoption of Welfare and Institutions Code section 3201, section 2931 was amended to make it inapplicable to individuals whose crimes were committed on or after January 1,

Institutions Code section 3201 refers to '"a system or body of laws,"' namely, article 2.5 of the Penal Code, and not to a specific statute or ordinance." Other cases have distinguished *Oluwa*, noting that it's conclusion that section 190's reference to article 2.5 was specific rather than general was reached in conjunction with an analysis of legislative intent. (*In re Jovan B., supra,* 6 Cal.4th at p. 816, fn. 3; see *People v. Eddy, supra,* 32 Cal.App.4th at p. 1106 and fn. 7.)

Oluwa differs from the present case in that the statute at issue here, section 2933.1, serves to *increase* rather than decrease the time served in prison by individuals to which it applies. *Oluwa*'s analysis—that the voters' will would be thwarted by increasing the credits available to these prisoners—does not apply here, where the effect of section 2933.1 is to *limit* available credits. Indeed, appellants' argument would allow convicted murderers to earn more credits than individuals convicted of offenses carrying lesser penalties, to whom section 2933.1 would apply. "'[T]he manifest purpose of section 2933.1 [is] to limit the presentence conduct credits for violent felons. Section 2933.1 was adopted as an urgency statute "[i]n order to protect the public from dangerous repeat offenders who otherwise would be released . . . ." (Stats. 1994, ch. 713 [Assem. Bill No. 2716), § 2.)'" (*People v. Sylvester* (1997) 58 Cal.App.4th 1493, 1496, quoting *People v. Ramos* (1996) 50 Cal.App.4th 810, 816-817.) It simply cannot have been the intent of the electorate, in section 190, to give convicted murderers a permanent entitlement to credits that would not be available to persons convicted of lesser offenses. It is more reasonable to view section 190 as having been intended to refer to article 2.5 generally, so that persons sentenced under section 190 would be entitled to credits as specified in article 2.5 as it might be amended from time to time. Additionally, this result is consistent with existing authority applying section 2933.1 to murder sentences, albeit

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1983. *Jones* rejected the argument that a defendant whose crime was committed after that date was nevertheless entitled to credits under section 2931 because Welfare and Institutions Code section 3201 referred specifically to section 2931 and therefore required application of the provisions of section 2931 as it existed when Welfare and Institutions Code section 3201 was enacted. (11 Cal.4th at pp. 121-125.)

without consideration of the issue addressed here. (*People v. Sylvester, supra*, 58 Cal.App.4th at p. 1495-1497; *People v. Aguirre* (1997) 58 Cal.App.4th 1135; *People v. Camba* (1996) 50 Cal.App.4th 857, 862-867.)[26]

X.

Mouton's final argument is that his sentence of 25 years to life constituted cruel and unusual punishment because he was young and immature, did not intend to kill or attempt to kill the victim, and was convicted under felony murder and aiding and abetting theories. He argues that the trial court should have granted his request to reduce his conviction to second degree murder and sentence him to 15 years to life.

In *People v. Dillon* (1983) 34 Cal.3d 441, the 17-year-old defendant and a group of his friends, armed with guns, a baseball bat, sticks, a knife and wire cutters, set out to steal marijuana from a secluded farm. After one of the friends accidentally discharged his firearm, one of the marijuana growers approached, carrying a shotgun, and the defendant rapidly fired his rifle at him, then fled without taking any marijuana. (*Id.* at pp. 451-452.)

Dillon reiterated the court's prior criticisms of the felony-murder rule: "We have repeatedly stated that felony murder is a 'highly artificial concept' which 'deserves no extension beyond its required application.' [Citations.] And we have recognized that the

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26 Respondent cites *People v. Jenkins* (1995) 10 Cal.4th 234, which held that sentencing a recidivist murderer under section 667.7 did not circumvent the intent of the electorate in adopted section 190, and *People v. Ruiz* (1996) 44 Cal.App.4th 1653, which reached the same conclusion with respect to sentencing under the Three Strikes law. Respondent notes these case's statement that "neither [section 190] nor any other provision of the initiative indicates that the electorate intended to preclude a murderer from receiving a total sentence that is greater than the term provided under section 190 where other factors, in addition to the fact of the conviction of murder, are present that increase the defendant's culpability or otherwise warrant greater punishment." (*People v. Jenkins, supra,* 10 Cal.4th at p. 246, fn. 7; *People v. Ruiz, supra,* 44 Cal.App.4th at p. 1660.) We do not view these cases as particularly helpful in resolving the question before us because, unlike section 2933.1, the statutes at issue in *Jenkins* and *Ruiz*

rule is much censured 'because it anachronistically resurrects from a bygone age a "barbaric" concept that has been discarded in the place of its origin' [citation] and because 'in almost all cases in which it is applied it is unnecessary' and 'it erodes the relation between criminal liability and moral culpability' [citation]." (*Dillon, supra,* 34 Cal.3d at p. 462-463.) Nevertheless, *Dillon* held that the felony-murder rule originated in California as "a creature of statute" and so could not be judicially abrogated. (*Id.* at p. 450.) The test applied in *Dillon*, following that set forth in *In re Lynch* (1972) 8 Cal.3d 410, considers "'the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society.'" (*Dillon, supra,* 34 Cal.3d at p. 479.) Courts consider "not only the offense in the abstract—i.e., as defined by the Legislature—but also 'the facts of the crime in question' [citation]—i.e., the totality of the circumstances surrounding the commission of the offense in the case at bar, including such factors as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his acts." (*Ibid.*) The inquiry into the nature of the offender "focuses on the particular person before the court, and asks whether the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." (*Ibid.*) In *Dillon*, the court reduced the defendant's conviction from first to second degree murder because there was evidence that the defendant was an immature youth who shot in a panic, without thinking; the jury expressed reluctance to apply the felony-murder rule and the trial judge expressed sympathy with that reluctance; the defendant had had no prior trouble with the law; and only "petty chastisements" were given to the other youths who had participated in the offense. (34 Cal.3d at pp. 482-488.)

Appellant's attack on the constitutionality of his sentence is largely based on criticism of the felony-murder rule, which allowed him to be held legally responsible for a killing he did not "specifically intend" to commit. As *Dillon* made clear, however, the

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established wholly separate sentencing schemes; *Jenkins* and *Ruiz* held that sentencing under these alternative schemes was not inconsistent with or precluded by section 190.

felony-murder rule remains the law in California. "'*Dillon*'s application of a proportionality analysis to reduce a first degree felony-murder conviction must be viewed as representing an exception rather than a general rule.' (*People v. Munoz* [(1984)] 157 Cal.App.3d 999, 1014 . . . ; see also *People v. Laboa* [(1984)] 158 Cal.App.3d 115, 122 . . . ; *People v. Harpool* [(1984)] 155 Cal.App.3d 877, 889-890 . . . .)" (*People v. Kelly* (1986) 183 Cal.App.3d 1235, 1247, fn. 1.) California courts have frequently rejected challenges on grounds of cruel and unusual punishment murder sentences imposed upon defendants convicted as aiders and abettors under the felony-murder rule who claimed to have no intent to kill. (*People v. Ortiz* (1997) 57 Cal.App.4th 480, 486 [14-year-old defendant wrote gang graffiti on wall after perpetrator shot victim; defendant had significant prior record]; *People v. Williams* (1986) 180 Cal.App.3d 922, 926 [defendant participated in planning of robbery, supplied murder weapon to direct perpetrator and did nothing to help victim]; *People v. Smith* (1986) 187 Cal.App.3d 666, disapproved on other grounds in *People v. Bacigalupo* (1991) 1 Cal.4th 103, 126, fn. 4 [defendant participated in robbery but claimed he was not triggerman and did not intend victim be killed; defendant had extensive criminal history]; *People v. Kelly, supra,* 183 Cal.App.3d 1235 [defendant claimed to have participated in robbery because he was afraid of codefendant; victim was shot while defendant was in different part of premises; defendant had significant prior record]; *People v. Rose* (1986) 182 Cal.App.3d 813 [defendant drove getaway car for premeditated robbery and knew direct perpetrators had guns]; *People v. Laboa, supra,* 158 Cal.App.3d 115 [defendant participated in robbery in which he knew guns were to be used, although victim killed accidentally while defendant was in a different room].) Cruel and unusual punishment challenges by defendants relying upon their youth have also been rejected by the courts. (*People v. Ortiz, supra,* 57 Cal.App.4th at p. 486 [14-year-old defendant convicted as aider and abettor under felony-murder rule]; *People v. Thompson* (1994) 24 Cal.App.4th 299, 306 [defendant aided and abetted friends who threw Molotov cocktail into residence during night, killing child]; *People v. Gonzales* (2001) 87 Cal.App.4th 1, 16 [16-year-old defendants,

convicted of murder as aiders and abettors, participated in assault to which codefendant openly carried gun; 14-year-old shooter had minor criminal history].)

In the present case, Mouton was 16 years old at the time of the offense but, unlike the case in *Dillon*, there was no evidence he was a particularly immature or unsophisticated youth. (See, *People v. Thompson, supra,* 24 Cal.App.4th at p. 306.) His juvenile record reveals one finding of receiving stolen property and one finding of possession of marijuana. The lack of a significant prior criminal record, while a factor in appellant's favor, is "not determinative in a cruel and unusual punishment analysis." (*People v. Gonzales, supra,* 87 Cal.App.4th at p. 17.) Mouton actively planned and participated in the robbery, which was knowingly perpetrated by means of a gun. Again unlike the situation in *Dillon*, there is no suggestion in this record that the victim was killed in a fit of panic: Carroll specifically followed Gil when the latter tried to flee from the robbers. Appellant counters respondent's suggestion that Mouton supplied the gun used to kill Gil with the prosecution's evidence that the rifle found by the police in Mouton's apartment was not the one used to kill Gil. Jones testified, however, that he saw Mouton with guns that evening, and saw Mouton give a gun to Carroll before the robbery. The casings recovered from the homicide scene were of the same type of ammunition as that found in Mouton's apartment, albeit a common type. Mouton was hardly an innocent with respect to guns generally: Peterson testified that she saw a rifle kept under a mattress in Mouton's apartment and a machine-gun type weapon kept in a closet there, and that she heard all three appellants discuss shooting "the gun" on New Year's; Jones testified that he saw Mouton take two rifles from behind the refrigerator in his apartment on the night of the homicide and saw him hand one to Carroll just before the robbery; and the police found a .22 rifle under the cushions of the couch where Mouton slept, ammunition under the couch and under the mattress in the bedroom and shotgun shells in the closet where Mouton kept his clothes.

Finally, unlike the situation in *Dillon,* Mouton's punishment was commensurate with that of the other participants in the offense: Mouton received exactly the same sentence as Greene, while Carroll received a considerably greater sentence due to the

application of the gun use enhancement. (See, *People v. Thompson, supra,* 24 Cal.App.4th at p. 306; *People v. Smith, supra,* 187 Cal.App.3d at p. 683; *People v. Kelly, supra,* 183 Cal.App.3d at p. 1246.)

The judgment is affirmed.

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Kline, P.J.

Concurring opinion of Haerle, J. and Ruvolo, J.

We concur in both the result reached in this case and almost all of the reasoning by which it is reached. We write only to distance ourselves from the lead opinion's suggestion (see, e.g., lead opn. at pp. 19-20) that, for *Wheeler/Batson* purposes, our Supreme Court's prior rulings have left room for an appellate court to engage in "comparisons" between jurors the prosecutorial challenges of whom are questioned by an appellant and those who were unchallenged.[1]

Our colleague, Presiding Justice Kline, cites language originating in *People v. Johnson* (1989) 47 Cal.3d 1194, 1220-1221, for the proposition that such a process is permissible as long as it does not place "undue emphasis on comparisons." But many other precedents suggest that our Supreme Court is far more negative on the tactic than that. (See, e.g., *People v. Fuentes* (1991) 54 Cal.3d 707, 715; *People v. Montiel* (1993) 5 Cal.4th 877, 909; *People v. Arias* (1996) 13 Cal.4th 92, 136, fn. 16; *People v. Jackson,* 13 Cal.4th 1164, 1197.) Accordingly, we disagree with the proposition, advanced by appellant and effectively sanctioned in the lead opinion, that we may engage in such comparative analyses.

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Haerle, J.

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Ruvolo, J.

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1 This issue is before our Supreme Court in another case from this Division, *People v. Johnson* (2001) 88 Cal.App.4th 318, petition for review granted July 18, 2001 (S097600).